

No. 90-1102-CFX  
Status: GRANTED

Title: Robert E. Gibson, Petitioner  
v.  
Florida Bar, et al.

Docketed:  
January 10, 1991

Court: United States Court of Appeals  
for the Eleventh Circuit

Counsel for petitioner: LaJeunesse Jr., Raymond J.

Counsel for respondent: Richard, Barry

11/26: Ord. granting ext. of time to file, to and  
incl. 1/17, by Kennedy, J. (CITED)

Entry	Date	Note	Proceedings and Orders
1	Nov 20 1990	G	Application (A90-386) to extend the time to file a petition for a writ of certiorari from January 3, 1991 to January 17, 1991, submitted to Justice Kennedy.
2	Nov 26 1990		Application (A90-386) granted by Justice Kennedy extending the time to file until January 17, 1991.
3	Jan 10 1991	G	Petition for writ of certiorari filed.
4	Feb 8 1991		Brief amicus curiae of Pacific Legal Foundation filed.
5	Feb 13 1991		DISTRIBUTED. March 1, 1991
6	Feb 13 1991	X	Brief of respondents Florida Bar, et al. in opposition filed.
7	Feb 21 1991	D	Motion of Joseph W. Little for leave to file a brief as amicus curiae filed.
8	Feb 25 1991	X	Reply brief of petitioner Robert E. Gibson filed.
10	Mar 4 1991		Motion of Joseph W. Little for leave to file a brief as amicus curiae DENIED.
11	Mar 11 1991		REDISTRIBUTED. March 15, 1991
12	Mar 18 1991		Petition GRANTED. *****
13	Apr 23 1991		Brief amici curiae of David P. Frankel, et al. filed.
16	Apr 29 1991		Brief amicus curiae of Pacific Legal Foundation filed.
14	May 1 1991		Joint appendix filed.
15	May 1 1991		Brief of petitioner Robert E. Gibson filed.
17	Jun 6 1991		Brief amici curiae of National Education Association, et al. filed.
18	Jun 6 1991		Brief amicus curiae of State Bar of Wisconsin filed.
19	Jun 6 1991		Brief of respondents Florida Bar, et al. filed.
20	Jul 11 1991		Reply brief of petitioner Robert E. Gibson filed.
21	Jul 30 1991		CIRCULATED.
22	Aug 13 1991		Record filed.
		*	Received certified record from USCA 11.
24	Sep 4 1991	X	Supplemental brief of respondents Florida Bar, et al. filed.
23	Sep 5 1991		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 6, 1991. (2ND CASE)
25	Oct 10 1991	X	Supplemental brief of petitioner Robert E. Gibson filed.
26	Nov 6 1991		ARGUED.

90-1102

Supreme Court, U.S.  
FILED

JAN 10 1991

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~~CLERK~~

No. 90-\_\_\_\_\_

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1990

ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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January 1991



## QUESTIONS PRESENTED

- I. Do the procedural safeguards mandated by the first and fourteenth amendments to the United States Constitution for the exaction of bar dues required as a condition of the practice of law include:
  - A. pre-collection reduction of an objecting attorney's dues to that amount which the state bar expects to use for purposes it can constitutionally charge to him; and,
  - B. pre-collection disclosure of the portion of dues that will be used for constitutionally chargeable purposes, rather than merely post-collection notice of particular political and ideological positions taken by the bar?
- II. Does a requirement that an attorney object to particular political and ideological positions when taken by the bar, rather than state one general objection to any use of his compulsory bar dues for constitutionally objectionable purposes, violate the first and fourteenth amendments by denying him a fair opportunity to challenge the amount that he must pay?
- III. Is the burden of proof under this Court's applicable decisions impermissibly shifted from the bar to the objector when an attorney is denied a refund of the part of his compulsory dues spent for nonchargeable purposes in the past, because he did not present evidence as to that portion, even though his complaint states a valid cause of action challenging such expenditures and requests declaratory, injunctive, and "all other relief to which [he] appears to be entitled"?

## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included as respondents the Members of the Board of Governors of the Florida Bar, identified in the complaint as: Patrick G. Emmanuel, Thomas M. Ervin, Jr., David V. Kerns, Thomas W. Brown, John M. McNatt, Jr., Rutledge R. Liles, Robert E. Austin, Jr., F. Wallace Pope, Jr., Louie N. Adcock, Jr., William E. Loucks, Stephen A. Rappenecker, William Trickle, Jr., Dan H. Honeywell, Robert E. Pyle, Phyllis Shampanier, Theodore Klein, Barry R. Davidson, Stephen N. Zack, Alan T. Dimond, Robert E. Livingston, Michael Nachwalter, George A. Dietz, J. Fraser Himes, Barry A. Cohen, Rowlett W. Bryant, Joseph J. Reiter, Sidney A. Stubbs, Jr., Joe F. Miklas, Ray Ferrero, Jr., Harry G. Carratt, Drake M. Batchelder, Elting L. Storms, Ben L. Bryan, Jr., J. Dudley Goodlette, Edwin Marger, Neil J. Berman, and Edwin P. Krieger, Jr.; and in the Initial Brief of Appellant at ii in the court of appeals as: William H. Clark, Thomas M. Ervin, Jr., Crit Smith, S. Austin Peele, Joseph P. Milton, A. Hamilton Cooke, Robert E. Austin, Jr., James A. Baxter, Kenneth C. Deacon, Jr., William F. Blews, Horace Smith, Jr., Robert O. Stripling, Jr., John Edwin Fisher, Chandler R. Muller, David B. King, R. Kent Lilly, Patricia A. Seitz, Edward R. Blumberg, Sandy Karlan, Manuel A. Crespo, Michael Nachwalter, Alan T. Dimond, John W. Thornton, Jr., Robert M. Sondak, Stuart Z. Grossman, Joseph H. Serota, Daniel A. Carlton, Benjamin H. Hill III, Gary R. Trombley, Thomas M. Gonzalez, C. Douglas Brown, Patrick J. Casey, Arthur G. Wroble, H. Michael Easley, Joe F. Miklas, James Fox Miller, Roger H. Staley, Terrence Russell, Walter G. Campbell, Jr., Thomas G. Freeman, George H. Moss II, John A. Noland, William L. Guzzetti, Harry W. Dahl, Frederick J. Bosch, David W. Bianchi, Ladd H. Fassett, Wilhelmina L. Tribble, and Ruth Ann Bramson.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 90-

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ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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Petitioner Robert E. Gibson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 23, 1990.

**OPINIONS BELOW**

The majority and dissenting opinions of the court of appeals (Appendix ("App.") A, *infra*, 1a, 17a) are reported at 906 F.2d 624. There was no formal opinion of the United States District Court for the Northern District of Florida; its unreported final order is reproduced as Appendix B, *infra*, 22a. An opinion of the

court of appeals on an earlier appeal (App. C, *infra*, 24a) is reported at 798 F.2d 1564; the unreported decision of the district court reversed on that appeal is reprinted as Appendix D, *infra*, 35a.

### JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. A timely petition for rehearing was denied on October 5, 1990 (App. E, *infra*, 43a). On November 26, 1990, Associate Justice Anthony M. Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 17, 1991. Order (U.S. No. A-386). The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1) (West Supp. 1990).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law \* \* \* abridging the freedom of speech \* \* \* or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State \* \* \*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article V, § 15 of the Florida Constitution provides: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

### STATEMENT OF THE CASE

The Florida Supreme Court has dictated by rule that to practice law in Florida an individual must be a member in good standing of respondent Florida Bar ("the Bar"). The rules regulating the Bar also require that, to maintain good standing, members must pay annual dues on or before July 1 of each year. App. C at 25a; Fla. Stat. Ann., Rules Regulating Bar, Rule 1-3, -7.3 (West Supp. 1990). Petitioner Robert E. Gibson is a member in good standing. App. C at 26a.

The purposes defined by the Florida Supreme Court for the Bar are "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." Fla. Stat. Ann., Rules Regulating Bar, Rule 1-2 (West Supp. 1990). One program for which the Bar uses dues is the taking and advocacy of positions on political and ideological issues, including ballot questions, through lobbying, publications, and speeches by Bar officials. App. C at 25a & n.1; App. D at 36a. When the Bar announced opposition to a ballot question actively supported by Mr. Gibson that would have limited state revenues, he brought this action under 42 U.S.C. § 1983. App. C at 26a; App. D at 35a.

The complaint alleges that the Bar's general practice of funding political advocacy with dues violates Mr. Gibson's first-amendment rights of free speech and association. App. A at 1a-2a.<sup>1</sup> Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343(3) (1982). App. D at 35a. The complaint requests

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<sup>1</sup> In addition to the Bar, the members of its Board of Governors are named as defendants. App. A at 1a.

declaratory, injunctive and "all other relief to which Plaintiff appears to be entitled." Dist. Ct. Record ("R.") 2 at 4, 10-11.

After a bench trial, the district court entered judgment for the Bar. App. C at 26a; App. D at 35a-42a. The court held that the "intrusion into plaintiff's rights occasioned by the Bar's legislative program" is justified by the state's interests in improving the administration of justice and advancing the science of jurisprudence and is sufficiently closely drawn, because of the Bar's policy that its Board of Governors must determine that legislation to be supported or opposed is related to those purposes. App. D at 41a.

The court of appeals reversed on appeal. It ruled that, because first-amendment rights are at stake, it was insufficient to rely on the existence of the policy and procedures by which the Bar took political and ideological positions. Rather, the court held, the Bar has the burden of proving that the actual past positions taken by it "were sufficiently related to its purpose of improving the administration of justice," i.e., that they "relate directly" to "the role of the lawyer in the judicial system and in society." App. C at 32a-33a. The action was remanded for further proceedings consistent with the court of appeals' opinion. *Id.* at 34a.

On remand, the Bar amended its policy to include a procedure by which members objecting to legislative positions could obtain post-collection refunds of part of their dues. It then moved for "judgment on the mandate" on the ground that its procedure satisfies the requirements set out in *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986). The district court held proceedings in abeyance until the procedure was incorporated in a bylaw amendment and approved by the Florida Supreme Court. That approval was given in *Florida Bar Re Amendment to Rule 2-9.3 (Legislative Policies)*, 526 So. 2d 688 (Fla. 1988). In response, Mr. Gibson moved to enjoin implementation of the amended bylaw and contended that he was entitled to damages for past unconstitutional use of his dues. App. A at 5a-7a; R. 40 at 5; R. 46 at 11; R. 56 at 13.

Under the amended bylaw, when the Bar adopts a legislative position, it publishes notice of that action in the next issue of the twice-monthly *Florida Bar News*. A member has forty-five days from the notice's publication to "file with the executive director a written objection to a particular position on a legislative issue." The bylaw specifies that failure to object within that period "shall constitute a waiver of any right to object to the particular legislative issue." After an objection is received, the Bar's executive director determines and puts in escrow the pro rata amount of the objector's dues placed in dispute by his objection pending determination of its merits. The Board of Governors then has forty-five days to decide whether to refund that amount or refer the objection to binding arbitration as to "whether the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues" or must be subject to a refund, with interest. App. A at 6a n.8, 8a-9a.

After hearing argument on Mr. Gibson's motion for injunctive relief, the district court entered a final order denying his motion and dismissing the action on the ground that the amended bylaw "meets the safeguards and requirements necessary for protection of members' first amendment rights." App. B at 22a-23a. Mr. Gibson again appealed. This appeal challenges the constitutionality of the Bar's amended bylaw and the district court's failure to order a refund of the part of his dues spent for objectionable purposes in the past. App. A at 8a-9a & n.11.

The court of appeals affirmed in substantial part, holding that the amended bylaw is constitutional, in all but one minor respect, and that Mr. Gibson is not entitled to retroactive damages. *Id.* at 9a n.11, 13a-16a. Circuit Judge Clark, dissenting, agreed with Mr. Gibson that this Court's precedents concerning compulsory union and bar dues require an advance reduction, rather than a refund, and prohibit requiring objections issue-by-issue, and that Mr. Gibson is entitled to a remedy for past unconstitutional expenditures. *Id.* at 17a-21a. A timely petition for rehearing was denied. App. E at 43a-44a.



## REASONS FOR GRANTING THE WRIT

### I. THE QUESTIONS PRESENTED BY THIS CASE SHOULD BE SETTLED BY THIS COURT, BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST-AMENDMENT FREEDOMS

Last Term, this Court held in *Keller v. State Bar*, 110 S. Ct. 2228 (1990), that the first amendment limits the purposes for which an "integrated" or "unified" state bar may spend dues which members pay as a condition of the practice of law. The use of compulsory bar dues to finance political and ideological activities to which an attorney objects violates his first-amendment rights of free association and speech when such expenditures are not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 2233-37 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

The Court also held that as a pre-condition to collecting compulsory dues an integrated bar must adopt procedures to prevent the use of objectors' dues for constitutionally impermissible purposes, such as "the sort of procedures described in *Hudson*," a case involving compulsory union fees. Because the state bar in *Keller* had no procedures for dealing with objections, the Court did not determine there "whether one or more alternate procedures would likewise satisfy that obligation." *Id.* at 2237-38. The record in this case, however, presents such significant questions of first-amendment due process for the first time in the context of the compulsory bar.

These are important questions due to the large number of attorneys whose first-amendment freedoms are burdened by integrated bars. As of 1987, almost 500,000 attorneys paid an average of \$157.00 per year to the unified bars of the thirty-one states, the District of Columbia, and the Commonwealth of Puerto Rico that require bar membership as a condition of the

practice of law. See Division of Bar Servs., A.B.A., 1987 *Bar Activities Inventory*, Tab B & Tab C, Table 2. And, of course, the Court's disposition of these questions would also be precedential in "agency shop" cases, because of the "substantial analogy" between the integrated bar and compulsory union fee arrangements. See *Keller*, 110 S. Ct. at 2235-36.

This case is exceptionally important because of more than the number of individuals affected, moreover. Freedoms guaranteed by the first amendment are "rights which we value most highly and which are essential to the workings of a free society." Therefore, in protecting first-amendment rights, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958); see *Hudson*, 475 U.S. at 303 n.12.

The Court twice acted upon that principle in an analogous context by granting certiorari in *Hudson* and *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), to consider the constitutionality of procedures adopted by unions to determine the amount of compulsory deductions and respond to nonmembers' objections. Indeed, in *Hudson*, 475 U.S. at 294, 300, as here, the only questions presented concerned what procedural safeguards are required by the first and fourteenth amendments for the collection of compulsory fees, and the Court explicitly cited the "importance of the case" as a reason for granting certiorari.

### II. IN NOT REQUIRING AN ADVANCE REDUCTION, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN HUDSON AND DECISIONS OF TWO OTHER UNITED STATES COURTS OF APPEALS

#### A. The Conflict With *Hudson*

The panel majority held, with Judge Clark dissenting, that the Bar need not provide an objector an advance reduction for

the proportion of dues that it expects to use for political activity, because "an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient." App. A at 13a-14a; *contra id.* at 17a-21a & n.3 (Clark, J., dissenting). That holding conflicts with this Court's decision in *Hudson*.

The panel majority relied on the fact that *Ellis*, 466 U.S. at 443-44, identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." See App. A at 14a. However, as Judge Clark said, *id.* at 18a, the "majority simply misreads" *Hudson* in not recognizing that the later case requires *both* escrow *and* advance reduction.

As *Hudson* explained, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did not decide whether an interest-bearing escrow account, by itself, would be constitutionally sufficient. *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444).

That question was reached for the first time in *Hudson*, because the union there had established an escrow for 100% of objectors' service fees. This Court held that *in addition* to that escrow, and other safeguards, an "appropriately justified *advance reduction* \* \* \* [is] necessary to minimize both the impingement [on nonunion employees' first-amendment interests] and the burden" of objection. *Id.* at 309 (emphasis added). Advance reduction is necessary, because a requirement that objectors pay into escrow monies to which the union (or bar) undoubtedly is not entitled is both an unjustifiable burden and an infringement upon first-amendment interests. As Justice Brennan said in *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion), a likely consequence of the compelled financial exaction is that "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained." *Accord Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980).

## B. The Conflict Among Courts Of Appeals

The panel majority's holding that an advance reduction is not constitutionally required under *Hudson* also directly conflicts with the decisions of two other United States courts of appeals, the Sixth and Ninth Circuits, on the same question.

Two different panels of the Sixth Circuit have ruled that

*Hudson* clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological purposes.

*Damiano v. Matish*, 830 F.2d 1363, 1369 (6th Cir. 1987); *accord Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987). In *Damiano*, 830 F.2d at 1369-70, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of dues that indisputably represents *nonchargeable* expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes."

The Ninth Circuit has explicitly rejected the view of the panel majority in this case and followed the Sixth Circuit to "hold that advance reductions of agency shop fees are required by *Hudson* even where the agency fee procedure includes an escrow of 100% of the collected agency fees." *Grunwald v. San Bernardino City Unified School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir. 1990) (2-1 decision).<sup>2</sup> A procedure under which the union

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<sup>2</sup> *Grunwald*, 917 F.2d at 1227, incorrectly cites *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989) (argued en banc Oct. 3, 1989), *Hohe v. Casey*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989), and *Andrews v. Education*



collects more than "a reasonable estimate of the percentage of fees attributable to" constitutionally chargeable costs is not the "carefully tailored" procedure required by *Hudson*, 475 U.S. at 303, for the collection of compulsory fees. *Grunwald*, 917 F.2d at 1228.<sup>3</sup>

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*Ass'n of Cheshire*, 829 F.2d 335 (2d Cir. 1987), as holding that no advance reduction is required by *Hudson*. In fact, only *Crawford*, 870 F.2d at 161, is directly on point, and it was vacated under Fourth Circuit Rule 35(c) by the grant of rehearing en banc. *Hohe*, 868 F.2d at 70, 74 n.7, was a decision on appeal from denial of a preliminary injunction and was "not intended to intimate any opinion regarding the ultimate merits"; moreover, the procedure in *Hohe* did provide an advance reduction, see *Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989). Advance reduction was not one of the issues determined in *Andrews*, 829 F.2d at 338-41, and the procedure there also apparently provided an advance reduction, see *id.* at 337-38.

<sup>3</sup> The union cases cannot be distinguished on the theory, advanced in the court of appeals, "that when Bar dues are assessed \* \* \*, the Bar does not yet know what political activity it will undertake in the coming year." App. A at 13a-14a. That is equally true when a union sets its dues amount before a fiscal year begins. A reasonable advance reduction can be based on the preceding year's expenditures. See *Hudson*, 475 U.S. at 307 n.18.

### III. IN NOT MANDATING NOTICE OF THE REDUCED DUES AMOUNT BEFORE DUES ARE COLLECTED, AND IN REQUIRING ATTORNEYS TO OBJECT EACH TIME THE BAR TAKES A POLITICAL OR IDEOLOGICAL POSITION, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *HUDSON* AND ITS PRECURSORS AND DECISIONS OF THREE OTHER COURTS OF APPEALS

#### A. The Conflict With *Hudson* And Its Precursors

Under the Bar's scheme, members must pay their full annual dues on or before July 1 of each year, the beginning of the Bar's fiscal year. Fla. Stat. Ann., Rules Regulating Bar, Rule 1-7.3, 2-6.2 (West Supp. 1990). Later, during the fiscal year, the Bar gives notice each time that it takes a position on a legislative issue, and members must within forty-five days file an objection to that particular position or waive their right to object. Only then is some portion of the dues escrowed and, possibly, rebated. App. A at 6a n.8, 8a-9a. The panel majority, with Judge Clark dissenting, held that rebate scheme constitutional, despite the lack of pre-collection notice and the requirement of multiple, issue-by-issue objections. App. A at 15a-16a; *contra id.* at 20a-21a & n.4 (Clark, J., dissenting). That ruling conflicts with this Court's decisions in *Hudson* and the other, earlier compulsory union fee cases on which *Keller* relied.

The minimum "constitutional requirements for the \* \* \* collection of [compulsory union and bar] fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310; see *Keller*, 110 S. Ct. at 2237. The scheme approved by the panel majority satisfies *none* of those requirements.

First, potential objectors are provided inadequate information about the basis for the portion of dues that the Bar

claims they must pay. *Hudson*, 475 U.S. at 306, held that "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*" v. *Detroit Board of Education*, 431 U.S. 209 (1977). Adequate disclosure requires a union seeking to collect a compulsory fee to "identif[y] the [major categories of] expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members," verified by an independent auditor, *not* merely the expenditures for purposes it concedes cannot be charged to objectors. *Hudson*, 475 U.S. at 306-07 & n.18.

In this context, adequate explanation of the basis for what an objecting attorney must pay includes the major categories of expenses, verified by an independent auditor, that the Bar claims "are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State,'" *Keller*, 110 S. Ct. at 2236 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)). Such an explanation obviously is not provided by periodic notices that the Bar has taken a legislative position.

Indeed, the Bar's notices provide *less* information than the disclosure held constitutionally inadequate in *Hudson*, 475 U.S. at 306-07, which at least told nonmembers what part of a member's dues they were not required to pay. Here, an attorney must object even to find out whether the Bar claims that expenditures concerning the legislation in question are chargeable and what portion of his dues are used to fund that activity. See App. A at 6a n.8.

Second, in requiring an objection *every time* the Bar takes a legislative position, the Bar's scheme fails to provide "an expeditious, fair, and objective" means of challenging the amount of the dues before an impartial decisionmaker. Because first-amendment rights are at stake, the procedures for asserting objection must "facilitate [an individual's] ability to protect his

rights." *Hudson*, 475 U.S. at 307 & n.20. Not permitting a standing objection to all nonchargeable exactions unduly burdens the individual's ability to protect his first-amendment rights, as the Court explicitly held in *Abood*, 431 U.S. at 241 (footnote omitted):

To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

The panel majority's assertion that the Bar's scheme does not confront an individual attorney with the dilemma identified in *Abood*, because an "objector need not provide any \* \* \* information concerning the motivation for his objection or his own position concerning the legislative policy at issue," App. A at 15a-16a, is completely disingenuous. As *Abood*, 431 U.S. at 241 & n.42, explained, requiring an objector to specify the causes which he does not want to support financially "necessarily discloses, by negative implication, those causes [he] does support." Moreover, in any event the Bar's scheme places on the individual the considerable burdens of monitoring its publication twice a month to determine whether it has taken positions on political and ideological matters which he does not want to subsidize and of objecting every time it has.<sup>4</sup>

Third, the notice and subsequent escrow under the Bar's scheme are untimely. One purpose of the disclosure "of the basis

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<sup>4</sup> The record shows that, to avoid waiving his rights under the Bar's scheme, in 1986 an attorney would have had to object at least six separate times and specify some twenty-nine legislative positions of the Bar which he did not want to support. See R. 52 at 2-4.



for the fee" and "escrow for the amounts reasonably in dispute" is "to avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Hudson*, 475 U.S. at 305, 310. A "remedy which merely offers the dissenters the possibility of a rebate does not avoid" that risk and thus is constitutionally inadequate. *Id.* at 305-06; *accord Ellis*, 466 U.S. at 443-44. In short, *Hudson* requires that the notice which triggers escrow precede the collection of any compulsory fees.<sup>5</sup>

Here notice, opportunity to object, and subsequent escrow do not occur until after the member's dues have been collected, and the Bar has been able to spend them. There is both a certainty that some portion of the dues will be spent on the taking of legislative positions, because notice is not even given until after that has occurred, and a risk that still more will be spent on the advocacy of those positions during the time that it takes for notice to be given in the Bar's publication and objection made by the individual attorney. As Judge Clark said, the "Bar plan is a pure rebate plan which \* \* \* uses Gibson's dues until he complains," a feature which has "been declared unconstitutional in several Supreme Court cases." App. A at 21a (dissenting).

#### B. The Conflict Among Courts Of Appeals

The panel majority's decision upholding the Bar's notice and objection scheme also conflicts with decisions of the United States courts of appeals for the First, Sixth, and Ninth Circuits.

In *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634-35 (1st Cir. 1990), the court held that an objection procedure adopted by the integrated bar of Puerto Rico was

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<sup>5</sup> That is not an unusual constitutional requirement: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950)) (emphasis added); see *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).

unconstitutional under *Hudson*, because it had two defects identified above that the scheme here shares: 1) the failure of the bar "at the outset of a dues year to categorize its \* \* \* actual anticipated expenditures" as chargeable or not so that individual attorneys have sufficient information to determine whether they wish to object; and, 2) "the need for objections to specific activities as a prerequisite for refunds."<sup>6</sup>

And, both the Sixth and Ninth Circuits have held "that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them." *Grunwald*, 917 F.2d at 1228 (9th Cir.); *accord Tierney*, 824 F.2d at 1503 (6th Cir.).

#### IV. IN DENYING A REFUND FOR PAST UNCONSTITUTIONAL SPENDING, THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS AS TO WHAT IS A SUFFICIENT PRAYER FOR RELIEF AND WHO HAS THE BURDEN OF PROOF IN COMPULSORY FEE CASES

The panel majority, with Judge Clark dissenting, denied Mr. Gibson a refund of the part of his compulsory dues that the Bar used to fund its nonchargeable political and ideological activities in the past. App. A at 9a n.11; *contra id.* at 19a-20a (Clark, J., dissenting). The majority declined to decide whether Mr. Gibson is entitled to a refund, because, it said, he "made no request for a refund or for monetary damages in his complaint; nor did he present any evidence on this issue at trial or on remand." *Id.* at 10a n.11. The first of those grounds for denying retroactive relief

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<sup>6</sup> *Schneider* would erroneously allow the bar to escrow the anticipated nonchargeable portion of dues, rather than provide an advance reduction as required by *Hudson*, *Damiano*, *Tierney*, and *Grunwald*. Compare *Schneider*, 917 F.2d at 634, with *supra* pp. 7-10. However, the objecting attorneys in *Schneider* apparently did not argue that advance reduction is required.

is clearly erroneous as a matter of fact, and both grounds are contrary to this Court's applicable decisions as a matter of law.

Mr. Gibson *did* request a refund or monetary damages, for his complaint prays for not only declaratory and injunctive relief, but also "all other relief to which Plaintiff appears to be entitled." R. 2 at 4, 10-11. Moreover, *Abood*, 431 U.S. at 241-42 & n.43, held that such a "general prayer" for other relief is as a matter of law sufficient to entitle objecting compulsory fee payors "to appropriate relief, such, for example, as the kind of remedies described in" *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963). Those remedies included "the refund of a proportion of the [past] exacted funds in the proportion that union political expenditures bear to total union expenditures." *Abood*, 431 U.S. at 240; *see id.* at 238.

The panel majority's denial of a refund on the ground that Mr. Gibson presented no evidence as to what refund he is due, App. A at 10a n.11,<sup>7</sup> assigns to him a burden of proof that is contrary to all of the Court's agency-shop decisions from *Allen* through *Hudson*. As summarized in *Hudson*, 475 U.S. at 306 & n.16 (emphasis added), the "nonmember's 'burden' is simply the obligation to make his objection known"; "the union retains the burden of proof" as to the proportion of its expenditures that are constitutionally chargeable. *Accord Ellis*, 466 U.S. at 457 n.15; *Abood*, 431 U.S. at 239-41 & nn.39-40; *Allen*, 373 U.S. at 118-19 & n.6, 122.

### CONCLUSION

When a state compels an individual to pay a fee to a union or bar association as a condition of employment or the practice of a profession, it infringes on his or her rights of free speech and

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<sup>7</sup> Mr. Gibson did present evidence, both before and after the remand, of political and ideological positions taken by the Bar in the past. *See* App. C at 25a n.1; R. 52; *see also* R. 66 (affidavit of the Bar's executive director attaching a compilation of legislative positions of the Bar).

association. *See Keller*, 110 S. Ct. at 2233-36. This Court confirmed in *Hudson*, 431 U.S. at 303, that "the fact that those rights are protected by the First Amendment requires that the procedure [for collection of the fee] be carefully tailored to minimize the infringement."

As shown above, the decision of the court of appeals' panel majority in this case ignores that general rule of first-amendment law; approves procedures which omit important, minimum constitutional safeguards explicitly mandated by *Hudson* and its precursors; and thus conflicts with both this Court's applicable decisions and decisions of three other United States courts of appeals on the same fundamental issues. In addition, the panel majority repudiates fundamental rules of pleading and of burden of proof which this Court has held necessary to protect individual rights in causes of action such as this one. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1991

## APPENDICES



**APPENDIX A**

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**OPINION OF THE UNITED STATES  
COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT**

**July 23, 1990**

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[906 F.2d 624]

**Robert E. GIBSON, Plaintiff-Appellant,**

**v.**

**THE FLORIDA BAR and Members of  
the Board of Governors,  
Defendants-Appellees.**

**No. 89-3388.**

United States Court of Appeals,  
Eleventh Circuit.

July 23, 1990.

[625] Before TJOFLAT, Chief Judge, ANDERSON and  
CLARK, Circuit Judges.

TJOFLAT, Chief Judge:

In this case, the plaintiff, a member of the Florida Bar, appeals the district court's dismissal of his suit challenging the Florida Bar's procedures for handling objections to the Florida Bar's use of compulsory bar dues to fund its political lobbying. The district court held that the procedures satisfied the constitutional requirements articulated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). We affirm in part and reverse in part.

I.

On March 27, 1984, the plaintiff, Robert E. Gibson, filed a complaint against the Florida Bar and the members of its board of governors (the Bar) seeking a declaratory judgment and injunctive relief. Gibson claimed that the Bar was violating his

first and fourteenth amendment rights<sup>1</sup> by using a portion of his compulsory dues to fund political lobbying. Specifically, Gibson challenged the Bar's use of compulsory dues to fund its campaign in opposition to a constitutional initiative known as "proposition one."<sup>2</sup> He also generally challenged [626]the Bar's use of compulsory dues to fund political lobbying. Gibson immediately moved for a preliminary injunction to prevent the Bar from further advocating its position against proposition one.

On that same day, the Florida Supreme Court issued an order removing proposition one from the general election ballot on the ground that it failed to comply with the single-subject requirement of Fla. Const. art. XI, § 3. *See Fine v. Firestone*, 448 So.2d 984 (Fla.1984). Accordingly, on March 28th, the district court denied Gibson's request for a preliminary injunction. The case then proceeded to trial, and in August 1985, the court issued a final judgment upholding the validity of the challenged activity and denying Gibson's request for a permanent injunction.

In its judgment, the court first held that the Florida Supreme Court's decision in *Fine* did not moot Gibson's suit because Gibson still challenged the Bar's general practice of funding political advocacy with compulsory bar dues. The court then held that under *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1976), the Bar's general practice was constitutionally permissible. The court reasoned that "the State may intrude upon plaintiff's First Amendment rights where the intrusion is justified by a sufficiently important state interest, and

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1. The first amendment, which the fourteenth amendment makes applicable to the States, *see Stromberg v. California*, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ; or the right of the people peaceably to assemble. . . ." U.S. Const. amend 1. For convenience, we label Gibson's claim a first amendment claim.

2. Proposition one, modeled after California's proposition thirteen, proposed an amendment to the Florida Constitution that would limit the amount of revenue that the State could collect through taxes.

so long as the intrusion is 'closely drawn.' " In the court's view, the Bar's purposes as articulated in the Integration Rule of The Florida Bar<sup>3</sup> constituted a "sufficiently important state interest." Moreover, the Bar's policy on political advocacy was sufficient to ensure that the Bar's political positions<sup>4</sup> would be closely enough related to these important state interests.

Gibson appealed this judgment. In *Gibson v. Florida Bar*, 798 F.2d 1564 (11th Cir.1986) [hereinafter *Gibson I*], a panel of this court reversed the district court and remanded the case for further proceedings. After a review of Supreme Court cases on the constitutionality of compulsory membership dues and of the

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3. The Preamble to the Integration Rule provides, in pertinent part:

To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence, the following principles are expressly adopted by the Court:

(a) The Florida Bar, a body created by and existing under the authority of this Court, is charged with the maintenance of the highest standards and obligations of the profession of law. . . .

4. Standing Board Policy 900 provided, in pertinent part:

a) The purposes of The Florida Bar are set forth in the Integration Rule. Neither The Florida Bar nor any of its committees or sections may take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Integration Rule.

b) The Bylaws of The Florida Bar set forth the restrictions on establishing a legislative policy. Article VI, Section 2 of the Bylaws provides that:

No legislative matter shall be recommended, approved, disapproved or endorsed by The Florida Bar unless such action is initiated by a written report and recommendation of a committee and approved by a majority vote of the active members present at the [annual] meeting; or, legislative matters may be recommended, approved, disapproved, or endorsed on behalf of The Florida Bar at any time by two-thirds vote of the members of the Board of Governors present at the meeting, and during the time when the Legislature is in session the Executive Committee may act upon pending or proposed legislation.

use of those dues to support political activities, e.g., *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); *International Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1985),<sup>5</sup> the panel concluded [627] that the Bar's use of compulsory dues to support political activity would be constitutional if a "compelling interest" supported the Bar's activity and if the Bar had used the "least restrictive means" of achieving that interest. *Gibson I*, 798 F.2d at 1569. Applying this analysis, the panel held that the district court had not adequately evaluated whether "certain positions taken by the Bar were sufficiently related to its basic function to justify the expenditure of compulsory dues" and therefore remanded the case to the district court for further findings on this issue. *Id.*

At the conclusion of its opinion, the panel "stressed" that it had addressed "only the use of compelled fees by the Bar." As the panel noted,

the union was free to politicize on *any* issue of interest to that group. . . . Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. . . . Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.

*Id.* at 1570 (citations omitted). In a footnote, the panel further explained that

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5. The panel held that these cases, almost all of which involved unions rather than bar associations, also controlled in cases involving bar associations. See *Gibson I*, 798 F.2d at 1568-69. The Supreme Court has also expressly adopted this position in *Keller v. State Bar*, — U.S. —, —, 110 S.Ct. 2228, 2235-37, — L.Ed.2d — (1990). I discuss that case in more detail below. See *infra* note 12.

the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program, but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying.

*Id.* at 1570 n. 5. At the time of the panel's disposition, however, the Bar had no such program or procedure, and the panel therefore remanded the case to the district court for findings on the propriety of the Bar's political activity.

In November 1986, the Bar amended Standing Policy 900 to include a set of refund procedures. The Bar then moved the district court for a "judgment on the mandate" on the grounds that these procedures complied with the requirements announced in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).<sup>6</sup> The Bar's motion in effect requested leave of court to amend its answer to *Gibson's* complaint and to file a counterclaim. The amended answer would assert that the controversy described in *Gibson's* complaint was moot, and the counterclaim would request a declaration that the Bar's new procedures passed constitutional muster. The court implicitly gave the Bar leave to proceed in this fashion<sup>7</sup> and, in March 1987, issued an order holding the case in abeyance for seventy days to allow for possible action by the Florida Supreme Court on the Bar's amendments to Standing Policy 900. The Bar subsequently undertook to amend its bylaws—a process requiring approval by the Florida Supreme Court—in order to incorporate the new procedure. The district court therefore

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6. See *infra* at 629-630 (discussing *Chicago Teachers*).

7. The parties submitted no revised pleadings; rather, the amendment process took place through the parties' memoranda to the court and hearings before the court.



extended the abeyance until the Florida Supreme Court acted. On June 2, 1988, the Florida Supreme Court issued an opinion approving rule 2-9.3, the amended bylaw.<sup>8</sup> See *Florida Bar Re*

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8. 2-9.3 Legislative Policies.

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in *The Florida Bar News*, in the issue immediately following the board meeting at which the positions were adopted.

(c) Objections to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(d) Composition of arbitration panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as practicable following the decision by the board of governors that a matter shall be referred to arbitration.

[note continued]

*Amendment to Rule 2-9.3 (Legislative [628]Policies)*, 526 So.2d 688 (Fla.1988). In April 1989, Gibson moved the district court to enjoin the application of the rule. After a hearing on the motion,

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The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member, and those two (2) members shall choose a third member of the panel who shall serve as chairman. In the event the two (2) members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the board of governors that the matter shall be referred to arbitration, The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. The arbitration panel shall thereafter confer and decide whether the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. The decision of the arbitration panel shall be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel shall order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the board of governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, The Florida Bar shall provide such refund within thirty (30) days of the date of the arbitration panel's report, together with interest calculated at the legal rate of interest as of the date the written objection was received by The Florida Bar.

the district court issued a final order in the case. Holding that rule 2-9.3 "meets the safeguards and requirements necessary for protection of members' first amendment rights, as set out in both the case of *Chicago Teachers Union v. Hudson* . . . and . . . *Gibson [I]*," the district court denied Gibson's request for injunctive relief and dismissed the case. Gibson appeals, challenging the constitutionality of rule 2-9.3.

## II.

### A. The Bar's Procedures.

As amended, rule 2-9.3 allows the Bar to adopt legislative positions pursuant to the procedures governing legislative activities in the Standing Board Policy 900, *see supra* note 4. If the Bar adopts a legislative position, the rule requires it to publish a notice of adoption in the next issue of The Florida Bar News, which is published twice monthly and mailed to all Bar members.<sup>9</sup> The rule also provides a procedure for handling objections to the Bar's legislative positions. Within forty-five days of publication of the notice of adoption, any member of the Bar may "file with the executive director a written objection to a particular position on a legislative issue." Rule 2-9.3(c). If a member fails to object within that time period, he waives his right to object. Once the director receives the objection, he must determine the pro rata amount of the member's dues that is being [629]used to fund the Bar's political activity and must place that amount in escrow pending determination of the objection's merits. The rule gives the Bar forty-five days either to refund the member's pro rata share<sup>10</sup> or to refer the matter to arbitration.

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9. We take judicial notice of these facts, thereby granting a motion by the Bar that was carried with the case.

10. The rule does not state whether this refund includes interest. The Bar, however, has indicated throughout this case that its refund procedures do  
[note continued]

If the Bar chooses to refer the matter to arbitration, it must prepare a written response to the member's objection, serve a copy of the response on the member, and forward a copy to the arbitration panel. The arbitration panel consists of three individuals, one chosen by the objecting member, another chosen by the Bar, and the third chosen by the first two individuals. The panel decides whether the political activity at issue can constitutionally be funded from compulsory bar dues, and its decision is binding on both the objecting member and the Bar. If the panel orders the Bar to refund the member, then within thirty days, the Bar must refund the member's pro rata share with interest, which is calculated at the legal rate from the date the Bar received the member's written objection. *See supra* note 9; *infra* at 628.

### B. Gibson's Contentions.

Gibson challenges these procedures on several grounds. His primary contention is that the Supreme Court cases in this area require an advance deduction rather than a refund. He also contends that the Bar's scheme unconstitutionally requires the dissenter to object on an issue-by-issue basis, thus unconstitutionally forcing the dissenter to identify his own position, and that the arbitration panel is impermissibly composed of other Bar members who necessarily have a monetary interest in the dispute. Gibson further claims that even if the refund scheme is permissible, the Bar improperly calculates interest only as of the date the Bar receives the member's written objection.<sup>11</sup> After reviewing

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include interest. Presumably, the Bar calculates interest on refunds paid within forty-five days after receipt of the written objection just as it calculates interest on refunds paid pursuant to an arbitration panel's order: "at the legal rate of interest as of the date the written objection was received by The Florida Bar." Rule 2-9.3(e)(4). We discuss the sufficiency of this provision below. *See infra* notes 13-14 & accompanying text.

11. Gibson also requests an award of retroactive damages in the form of a refund for the proportion of his compulsory dues that the Bar has used to  
[note continued]



the Supreme Court's pronouncements in *Chicago Teachers*, we address these contentions in turn.

C. Analysis.

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court considered whether the grievance procedure established by a teachers union to process objections by non-union members concerning the use of their dues was constitutionally sufficient. The union in that case acted as the exclusive collective-bargaining representative of approximately ninety-seven percent of Chicago's public school teachers. Nonmembers received the benefits of union representation without paying dues. In 1982, the union entered into an agreement with the Chicago Board of Education, whereby the Board would deduct "proportionate share payments" from nonmembers' salaries.

The union also established procedures for handling nonmembers' objections about the deductions. Pursuant to these procedures, once the deduction had been made, the nonmember could object within thirty days in writing to the union president. If both the union's executive committee and its executive board decided against the objector, then the union president would select a single arbitrator from a list maintained by the Illinois Board of Education. If the arbitrator ruled in favor of the objector, then the union would give the objector [630] a rebate and reduce the amount of future deductions for all nonmembers.

When the first paycheck deduction was taken in 1982, several nonmembers objected, contending that the union was using a proportion of their dues for activity unrelated to collective bargaining. The union sent brief responses to the nonmem-

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fund its political lobbying in the past. Gibson, however, now makes this request for the first time. He made no request for a refund or for monetary damages in his complaint; nor did he present any evidence on this issue at trial or on remand. We, therefore, do not reach this question.

bers, explaining how the proportionate deduction had been calculated and describing the objection procedures. The objecting nonmembers then brought suit in federal court challenging the objection procedures.

The Supreme Court began its evaluation of the procedures with a review of *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). As the Court stated, *Abood* stands for the proposition that, although a public employer may constitutionally designate a union to be an exclusive collective-bargaining representative and require its nonmember employees to pay a fair share of the costs relating to the union's collective-bargaining, the nonmembers cannot constitutionally be required to support political activity by the union that is unrelated to the union's collective-bargaining duties. *Chicago Teachers*, 475 U.S. at 301-02, 106 S.Ct. at 1073 (citing *Abood*, 431 U.S. at 234, 97 S.Ct. at 1799). Thus, "[t]he objective" of the procedures for handling objections "must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* 475 U.S. at 302, 106 S.Ct. at 1074 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800).

Applying this standard, the Court determined that the union's procedure was defective in three respects. First, the possibility of a rebate did not adequately ensure against the risk that the objectors' funds would be used even temporarily for an improper purpose. *Id.* 475 U.S. at 305, 106 S.Ct. at 1075. Second, the union's advance reduction of nonmembers' dues was inadequate because the union failed to provide information on how the proportionate share had been determined. *Id.* at 306, 106 S.Ct. at 1075. Third, because the union "entirely controlled" the arbitration procedure "from start to finish," the procedure did not provide for a "reasonably prompt decision by an impartial decisionmaker." *Id.* at 308, 307, 106 S.Ct. at 1076-77, 1076.

The Court also considered whether a 100% escrow of the nonmembers' dues would eliminate the procedure's defects. The

court held that the escrow would eliminate the procedure's first flaw—the risk that nonmembers' contributions would be temporarily used for impermissible purposes. Indeed, the court expressly stated that a 100% escrow was not necessary; an escrow of the proportion at issue would be sufficient. Even a 100% escrow, however, did not eliminate the procedure's second and third defects. *Id.* at 309-10, 106 S.Ct. 1077-78. The Court therefore held the procedure unconstitutional, concluding as follows:

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

*Id.* at 310, 106 S.Ct. at 1078.

We apply the *Chicago Teachers* holding to the present case in order to determine whether, in light of Gibson's challenge, the objection procedures established by the Bar in rule 2-9.3 accomplish the required "objective . . . of preventing compulsory subsidization of ideological activity by [Bar members] who object thereto without restricting the [Bar's] ability to require every [member] to contribute to the cost of [permissible] activities." *Id.* at 302, 106 S.Ct. at 1074 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800).<sup>12</sup> We consider Gibson's contentions in turn.

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12. This application of *Chicago Teachers* is consistent with the Supreme Court's recent decision in *Keller v. State Bar*, — U.S. —, 110 S.Ct. 2228, — L.Ed.2d — (1990). In *Keller* members of the California State Bar challenged the Bar's use of mandatory dues to finance political activities. The Supreme Court applied the rule in *Abood* that unions, and by implication bar associations, cannot fund political activities from the mandatory dues of employees or bar members who *object* to such expenditures. *See id.* — U.S. at —, 110 S.Ct. at 2233-35. Of course, as the Court noted in *Keller*, political activities can still be funded from mandatory dues of *non-objecting* employees

[note continued]

[631]

1.

Gibson first argues that the Supreme Court cases require the Bar to provide an advance deduction for the proportion of dues that the Bar knows will be used for political activity. In response, the Bar contends that the cases clearly approve an interest-bearing escrow account as an alternative. In addition, the Bar claims that an advance deduction would not be feasible. It argues that when Bar dues are assessed on July 1, the Bar does not yet know

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or bar members. *See id.* The Court pointed to *Chicago Teachers* as the case in which the Court "outlined a minimum set of procedures by which a union . . . could meet its requirement under *Abood*," *id.* — U.S. at —, 110 S.Ct. at 2237, that is, by which the union or bar could ensure that objecting members' dues were not used to finance the political activity at issue.

Unlike the Florida Bar in the present case, however, the California Bar provided no procedures for handling bar members' objections to such expenditures. The Court in *Keller* thus addressed the California Bar's broader argument that *Abood* did not apply to its use of compulsory dues to finance political activities because the Bar was a state agency and therefore could use the dues for any purpose within its broad statutory authority. *See id.* — U.S. at —, 110 S.Ct. at 2228. The Supreme Court rejected this argument and held that the Bar was subject "to the same constitutional rule [under *Abood*] with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* — U.S. at —, 110 S.Ct. at 2235. The Court then suggested what kinds of expenditures, at "the extreme end[ ] of the spectrum," *id.*, would implicate that rule and remanded the case for further proceedings consistent with the opinion.

The Court in *Keller* thus reaffirmed the holdings of *Abood* and *Chicago Teachers* and expressly applied those holdings to state bar associations as well. Because the case before it lacked a developed record regarding possible procedures to satisfy this requirement, however, the Court declined to conduct any analysis of what procedures would satisfy the mandate of *Chicago Teachers* under the circumstances in *Keller*. *See id.* — U.S. at —, 110 S.Ct. at 2237-38. The present case, in contrast, involves exactly such an issue concerning the Florida Bar's objection procedures. We therefore undertake to analyze those procedures under *Chicago Teachers*—an undertaking which is entirely consistent with the Supreme Court's recent pronouncements in *Keller*.



what political activity it will undertake in the coming year. Moreover, it does not spend a fixed amount on political activity from year to year.

We reject Gibson's reading of the caselaw on this point. In *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44, 104 S.Ct. 1883, 1889-90, 80 L.Ed.2d 428 (1984), the Supreme Court invalidated a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or* interest-bearing escrow accounts." (Emphasis added.) The Court restated this proposition in *Chicago Teachers*, 475 U.S. at 303-04, 106 S.Ct. at 1074 (quoting *Ellis*), and stated that "an escrow for the amounts reasonably in dispute," along with an adequate explanation of the fee and an opportunity to challenge the amount, would satisfy the constitutional requirements for an objection procedure, *id.* at 310, 106 S.Ct. at 1078. These statements provide indisputable authority that an interest-bearing escrow account (along with an otherwise satisfactory procedure) is sufficient. Gibson would have us believe that these statements are merely dicta and thus not controlling. He suggests that every objection procedure approved by the Supreme Court has involved an advance deduction. In light of the Court's express approval of a proportionate escrow in *Chicago Teachers*, we reject Gibson's argument.

Gibson also challenges rule 2-9.3(e)(4), which provides for the calculation of interest on refunds after arbitration only "as of the date the written objection was received."<sup>13</sup> We hold that this formula for [632]calculating interest is not sufficient to "avoid the risk that [the objecting members'] funds will be used,

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13. As we note above, *supra* note 10, rule 2-9.3 does not specify whether refunds issued without arbitration (within forty-five days after the Bar receives a written objection, pursuant to section (c)(2)) include interest. At oral argument, the Bar asserted that its refund procedures included interest payments. Based on this representation, we assume that refunds pursuant to section (c)(2) include interest, which is calculated in the same fashion as interest on refunds pursuant to section (c)(4).

even temporarily, to finance ideological activities," *Abood*, 431 U.S. at 244, 97 S.Ct. at 1804 (Stevens, J., concurring). By calculating interest only "as of the date the written objection was received," the Bar can use the interest generated by the members' dues from the time of payment in July until the time of the objection. As the Bar has argued, it may not begin its lobbying until later in the year. Even if a member objects promptly after receiving notice of the Bar's position in the Florida Bar News, the Bar can still make use of the interest generated from the member's proportionate share until that time. We therefore find Gibson's attack on this point to be persuasive.<sup>14</sup> In order to protect against the danger that the objecting members' funds will be used in this way to finance the Bar's political activity, the Bar would have to calculate interest as of the date that payment of the members' bar dues was received.

2.

Gibson next contends that the Bar's procedures impermissibly require dissenting members to object on an issue-by-issue basis, thus forcing them to identify their own political positions. The Bar responds that members need only make a generalized objection that a given issue is not closely enough related to the Bar's purposes to justify an expenditure of compulsory dues. The Bar claims that such an objection does not impermissibly require objectors to disclose their own position regarding the issue. We agree.

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." *Chicago Teachers*, 475 U.S. at 306, 106 S.Ct. at 1075 (citing *Abood*, 431 U.S. at 239-40 & n. 40, 97 S.Ct. at 1801-02 & n. 40). This burden "is simply the obligation to make his objection known." *Id.* 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16. The affirmative objection requirement here is within the scope of this obligation. It merely requires the

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14. Our holding applies as well to the calculation of interest on refunds issued pursuant to section (c)(2).

objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue. We therefore reject Gibson's challenge on this point.

3.

Finally, Gibson challenges the composition of the arbitration panel under rule 2-9.3. He claims that the panel is impermissibly composed of Bar members, who necessarily have an interest in the arbitration's outcome. The Bar responds that an arbitrator's mere membership in the Bar is insufficient to taint the arbitration proceeding. We agree with the Bar.

In *Chicago Teachers* the Court held that the arbitration procedure was objectionable because it was "from start to finish . . . entirely controlled by the union." 475 U.S. at 308, 106 S.Ct. at 1076-77. Under the procedures in that case, the union itself selected a single arbitrator. The procedures here are clearly distinguishable. Rule 2-9.3 provides for a tripartite arbitration panel, and although the Bar picks one panel member, the objector picks another, and the third is chosen by the first two members of the panel. Thus, the Bar has nowhere near the degree of control over the arbitration process that the union had in *Chicago Teachers*. Given the nature of arbitration panels in this case—composed of arbitrators representing the competing parties' interests—whatever interest the arbitrators might have in the outcome as members of the Bar has no significance whatsoever. We therefore reject Gibson's challenge on this basis as well.

### III.

For the foregoing reasons, we hold that the Bar's procedures for handling objec[633]tions to its political lobbying are sufficient except for the formula for calculating interest on refund payments. The district court's decision is therefore AFFIRMED in part and REVERSED in part.

IT IS SO ORDERED.

CLARK, Circuit Judge, dissenting:

I dissent. I agree with appellant Gibson. His position is stated by the majority (at 629): "[Gibson's] primary contention is that the Supreme Court cases in this area require an advance deduction rather than a refund." In affirming the district court on this point, the majority fails to follow the precedent of *Gibson I*<sup>1</sup>, which held:

The *Abood* court concluded that a union may not spend compelled fees for the advancement of political views or ideological causes that are not incidental to the union's role as bargaining unit. . . . Stated another way, "*Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees."

\* \* \* \* \*

The similarities between union dues and integrated bar dues are so substantial that we may safely transpose the *Abood* holding to the facts presented in this appeal as follows: the Florida Bar may use compulsory Bar dues to finance its Legislative Program *only* to the extent that it assumes a political or ideological position on matters *that are germane to the Bar's stated purposes*. (Emphasis added.)

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The proper focus in this action should be upon the actual results of the Bar's Legislative Program, *i.e.*, whether past positions of the Bar were sufficiently related to its purpose

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1. *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir.1986).



of improving the administration of justice. On this issue, *the Bar bears the burden of proving that its expenditures were constitutionally justified.* (Emphasis added.)

*Gibson I*, 798 F.2d at 1567-69 (citations omitted). There is no dispute about the fact that the Bar has never established that "its expenditures were constitutionally justified."

The majority simply misreads *Chicago Teachers Union v. Hudson*.<sup>2</sup> The panel says, "The union also established procedures for handling nonmembers' objections about the deductions." (at 629). The panel compares the procedure there to the procedure in the Florida Bar rule. The panel overlooks that the nonmembers in *Chicago Teachers* were only paying 95% of the union dues as a consequence of the union making advance deductions for activities not germane to pure union objectives. As described in *Chicago Teachers*, 475 U.S. at 295, 106 S.Ct. at 1070, the union identified expenditures unrelated to collective bargaining and contract administration for the past year and found them to be approximately 5%.

The union in *Chicago Teachers* did exactly what appellant Gibson is asking our court to require the Bar to do in this case. It deducted in advance that portion of the dues allocable to those expenditures it acknowledged to be unrelated to collective bargaining and contract administration. The union then went on to establish a procedure where nonmembers could object to expenditures by the union of payments from any part of the 95% used toward legislative and political activities which were nevertheless still anathema to those nonmembers. The panel adopts this latter procedure without requiring the Bar to deduct in advance that part of Gibson's dues which can be approximated

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2. 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

from experience to be allocable to non-administration of justice lobbying activities.<sup>3</sup>

[634] Such "non-administration of justice" lobbying was identified in note 1 of *Gibson I* as positions that had been taken by the Florida Bar in the past: "(1) opposed tort reform; (2) opposed limitation of damages in medical malpractice actions; (3) opposed changes in the state sales tax; (4) opposed changes in the state's taxation and venue powers; and (5) advocated regulation of child care centers." *Id.* at 1565 n. 1.

The panel in note 4 of *Gibson I* identified as acceptable areas for Bar lobbying to be: "(1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards." *Id.* at 1569 n. 4. It is the law of the case that the Bar has in the past expended members' dues for lobbying activities unrelated to the administration of justice. Gibson won his case before the first panel and

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3. The majority accepts the Bar's argument "that advance deductions would not be feasible" because the Bar claims it "does not yet know what political activity it will undertake in the coming year." This is rebutted in the Court's recent opinion in *Keller v. State Bar of California*, — U.S. —, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). The Court specifically states it is in agreement with Justice Kaufman's dissent in the California Supreme Court case where he said:

Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members' annual dues (Bus. and Prof.Code § 6140.1), the argument that the constitutionally mandated procedures would create 'an extraordinary burden' for the bar is unpersuasive. 'While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of *Abood* procedures for over a decade.' [47 Cal.3d 1152, 255 Cal.Rptr. 542, 568] 767 P.2d 1020, 1046. (Emphasis added.)

loses here by not being afforded a remedy. He is entitled to the same relief allowed to the plaintiffs in *Abood*, *Chicago Teachers*, and *Ellis*.

In *Chicago Teachers*, the Supreme Court opens with this quotation:

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, *collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent.*" *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984). (Emphasis added.)

475 U.S. at 294, 106 S.Ct. at 1069, 89 L.Ed.2d at 239. By permitting the Florida Bar to *collect* dues from the dissenter Gibson and then requiring him to notify the Bar of those individual lobbying activities to which he objects,<sup>4</sup> the majority

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4. The majority rejects Gibson's First Amendment claim that he should not be required to identify on an issue-by-issue basis those political positions to which he objects. Again the majority ignores *Abood* which holds:

But in holding that as a prerequisite to any relief each appellant must indicate to the Union the *specific* expenditures to which he objects, the Court of Appeals ignored the clear holding of [*Railway Clerks v. Allen*] [373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963)]. As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public

[note continued]

pays little or no attention to Supreme Court authority and our prior panel opinion.

The majority also misapplies *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). The majority quotes the Supreme Court as invalidating a "pure rebate approach" but noted the existence of "readily available alternatives, such as advance reduction of dues *and/or inter[635]est-bearing escrow accounts.*" (at 631). But the Court went on to say, "Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily." *Ellis*, 466 U.S. at 444, 104 S.Ct. at 1890, 80 L.Ed.2d at 439. The Bar plan is a pure rebate plan which places the burden of proving the impropriety of the Bar's expenditure upon the member and uses Gibson's dues until he complains. These features of the Bar's plan have been declared unconstitutional in several Supreme Court cases.

For the foregoing reasons, I dissent.

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disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

97 S.Ct. at 1802-03 (emphasis in original; footnote omitted).



**APPENDIX B**

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**FINAL ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA**

**May 3, 1989**

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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

ROBERT E. GIBSON, [Clerk's Stamp omitted in printing -  
Filed May 3, 1989]

Plaintiff,

v.

CASE NO. TCA 84-7109-MMP

THE FLORIDA BAR, et al.,

Defendants.

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FINAL ORDER

This cause is before the court upon the plaintiff's emergency motion for preliminary injunction (doc. 68), on which argument was heard on May 2, 1989. This court has reviewed the rules and procedures recently implemented by the Florida Bar, which were adopted by the Florida Supreme Court in The Florida Bar Re Amendment to Rule 2-9.3 (Legislative Policies), 526 So. 2d 688 (Fla. 1988), and now codified as rule 2-9.3, Legislative policies, Rules Regulating the Florida Bar. The rule as adopted meets the safeguards and requirements necessary for protection of members' first amendment rights, as set out in both the case of Chicago Teacher's Union v. Hudson, 475 U.S. 292, 106 S. Ct. 1066 (1986), and the Eleventh Circuit opinion in the case at bar, Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986).

Accordingly, the plaintiff's motion for preliminary injunction is DENIED. Further, as no subsequent proceedings are necessary in this case, this case is hereby DISMISSED. This court reserves jurisdiction to determine any appropriate costs to be awarded.

DONE AND ORDERED this 2nd day of May, 1989.

/s/Maurice M Paul  
United States District Judge

**APPENDIX C**

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**OPINION OF THE UNITED STATES  
COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT**

**September 15, 1986**

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[798 F.2d 1564]

**Robert E. GIBSON, Plaintiff-Appellant,**

**v.**

**THE FLORIDA BAR and Members of  
the Board of Governors,  
Defendants-Appellees.**

**No. 85-3711.**

United States Court of Appeals,  
Eleventh Circuit.

Sept. 15, 1986.

[1565] Before HILL, Circuit Judge, HENDERSON,\* Senior  
Circuit Judge, and LYNNE\*\*, Senior District Judge.

LYNNE, Senior District Judge:

I.

In this constitutional challenge to the lobbying activities of the Florida Bar, plaintiff Robert E. Gibson contends that the Bar violated his first amendment rights of free speech and association by spending compulsory bar dues to espouse political and ideological positions. The district court found that the Bar's stated purpose of improving the administration of justice served as a sufficiently important governmental interest to justify the intrusion upon Gibson's rights caused by the Bar's Legislative

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\* See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

\*\* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.



Program. We reverse, holding that certain positions taken by the Bar are not sufficiently germane to its administration-of-justice function to justify the expenditure of compulsory dues.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The Florida Supreme Court, pursuant to Article V, Section 15 of the Florida Constitution, has exclusive jurisdiction to regulate the admission to practice and discipline of attorneys. The court has mandated that, in order to practice law in Florida, one must be a member in good standing of the Florida Bar, which in turn requires the payment of annual dues. *See Integration Rule of the Florida Bar*, Articles II, VIII. In the Integration Rule, the supreme court delineates the purposes of the Bar as threefold: "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." *Id.*

The Bar engages in a Legislative Program in which it lobbys before the Florida Legislature and takes official positions on various public issues.<sup>1</sup> The Bar has adopted Standing Board Policy 900, which sets forth regulations and procedures by which the Bar takes positions on ballot questions and legislative matters. Under Policy 900, either the Bar's Legislation [1566] Committee or Executive Committee considers an issue and determines whether its subject matter is within the scope of the Bar's authority as set forth in its Rules and By-Laws. If so, the committee then determines by majority vote what position the Bar should adopt with respect to that issue. The Bar Board of

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1. In addition to traditional legislative lobbying measures, the Bar promulgates its political and ideological positions through official Bar publications and speeches by Bar officials. The record demonstrates that the Bar has espoused the following positions: (1) opposed tort reform; (2) opposed limitation of damages in medical malpractice actions; (3) opposed changes in the state sales tax; (4) opposed changes in the state's taxation and venue powers; and (5) advocated regulation of child care centers.

Governors then considers the recommendation of the committee and determines the official Bar position.

Appellant Robert E. Gibson is a member in good standing of the Florida Bar. Gibson actively and financially supported a campaign on behalf of "Proposition One," a ballot question seeking limitation of government revenue that eventually was stricken from the ballot. When the Bar publicly announced its opposition to Proposition One, Gibson filed this action for declaratory and injunctive relief, claiming that the Bar's use of compulsory dues constituted a violation of his first amendment rights of free speech and association. Gibson contended that the first amendment prohibited the use of compulsory dues to advocate any position on any matter other than direct advocacy to a judicial body. The case was tried before the district court, which entered a judgment in favor of the Bar. The district court held that the Bar's administration-of-justice function was "a 'sufficiently important' state interest to justify the degree of intrusion into plaintiff's rights occasioned by the Bar's legislative program." This appeal followed.

## III. DISCUSSION

At the heart of this appeal is the appellant's contention that his rights of free speech and association have been infringed by the Bar's use of compulsory dues to espouse political and ideological positions with which the appellant does not agree.<sup>2</sup>

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2. "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266 (1972). "[F]reedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973).

The legal underpinnings necessary to resolve this question are derived from a series of United States Supreme Court cases, one of which upholds the constitutionality of the integrated state bar, and others which involve the closely analogous situation where union members are forced to financially support union lobbying measures through compelled membership dues or agency shop fees.

A. *Constitutionality of Compulsory Membership Dues*

In *Lathrop v. Donahue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961), the Court addressed the question of the constitutionality of the Wisconsin integrated bar. Six members of the Court agreed that, when its membership requirement was limited to the compulsory payment of reasonable annual dues, Wisconsin's integrated bar caused no "impingement upon protected rights of association." 367 U.S. at 843, 81 S.Ct. at 1838. *Lathrop* stopped short, however, of a resolution of the very issue before this court: whether the use of dues money to support political activities of the state bar infringed upon constitutional rights of free speech. The plurality opinion of the Court concluded that the record in *Lathrop* provided no sound basis for deciding this additional constitutional challenge.<sup>3</sup>

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A state may restrict the speech of a private person only when the restriction is a precisely drawn means of serving a compelling state interest. *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2334 (1980).

3. In his concurring opinion, Justice Harlan strenuously contended that because it was not unconstitutional to require the payment of dues, it could not be unconstitutional for a state bar to use such funds to fulfill a basic purpose for which the bar was established. Assuming that there existed some valid distinction between free association and free speech rights in the context of an integrated bar, Justice Harlan stated that the integrated bar did not divest Wisconsin lawyers of the freedom of individual thoughts, speech, and association. (P. 881) The concurrence went on to state that the state interest

[note continued]

[1567] Admittedly, *Lathrop v. Donahue* offers little, if any, specific guidance on the first amendment rights at issue in this appeal. See *Aboud v. Detroit Board of Education*, 431 U.S. at 233, n. 29, 97 S.Ct. at 1798 n. 29. Unfortunately, *Lathrop* is the last Supreme Court decision squarely to address the first amendment rights of lawyers in an integrated bar. For additional illumination in this area, we must turn to the closely related situation where employees are required by law to contribute funds to labor unions, which in turn use some portion of those funds for political activities similar to the Florida Bar's legislative program. The close connection between these two groups was recognized in *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), when the Court held that the first amendment did not excuse employees from government-sanctioned, compelled membership in a union as a condition of continued employment. *Hanson* recognized that compelled union dues do infringe upon first amendment rights, but held that Congress' desire to promote collective bargaining was a sufficiently compelling governmental interest to justify such an infringement. When explaining its justification of compulsory union dues, the Court alluded to the integrated bar as an *a fortiori* example of a type of required membership that passes constitutional muster. 351 U.S. at 238, 76 S.Ct. at 721.

In *International Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court considered a related issue also arising out of union membership required by the Railway Labor Act: whether compelled union dues could be used to finance election campaigns and lobbying activities. The Court avoided deciding this challenge on a constitutional basis, holding that the Act prohibited the use of compulsory dues for political purposes. 367 U.S. at 768, 81 S.Ct. at 1799.

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in an integrated bar is "sufficiently important to justify whatever incursions on these individual freedoms may be thought to arise" from the compulsory dues requirement. (P. 861)



B. *Use of Compulsory Fees for Political Purposes*

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court faced a challenge to an agency shop agreement under which all teachers who failed to join the union were required to pay the union a service fee equal to the regular dues amount. *Abood* followed the rationale of *Hanson* and *Street*, *supra*, holding that the government's interest in promoting collective bargaining and discouraging "free riders," (employees who benefit from union representation without contributing financially), justified the agency shop agreement in question. The Court continued, however, to address the issue it chose to avoid in *Hanson*, *Lathrop*, and *Street*: whether fees compelled by law as a condition of continued employment could be used for political and ideological purposes.

*Abood* first observed that former Supreme Court decisions "established with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. [citations omitted] . . . [C]ontributing to an organization for the purpose of spreading a political message is protected by the First Amendment." 431 U.S. at 233, 97 S.Ct. at 1798. The Court further held that any "limitations upon the freedom to contribute implicate fundamental First Amendment interests," (citing *Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612, 636, 46 L.Ed.2d 659 (1976)), and stated that compelled contributions caused no less an infringement upon constitutional rights than prohibited contributions. *Id.* 431 U.S. at 234, 97 S.Ct. at 1799. The *Abood* court concluded that a union may not spend compelled fees for the advancement of political views or ideological causes that are not incidental to the union's role as bargaining unit. *Id.* at 235, 97 S.Ct. at 1799. Stated another way, "*Abood* held that employees may not be [1568]compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees." *Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271, 291, n. 13, 104 S.Ct. 1058, 1070 n. 13, 79 L.Ed.2d 299 (1984).

C. *Applying Abood to the Florida Bar*

At the risk of oversimplification, *Abood* may be read to say that compulsory union or agency shop fees may not be spent on lobbying or ideological activities that are not germane to the purpose that brought the union together in the first place. See *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1891, 80 L.Ed. 428, 447 (1985). As stated *supra*, the Supreme Court has referred to the similarity between union dues and bar dues, see *Railway Employees' Dept. v. Hanson*, 351 U.S. at 238, 76 S.Ct. at 721; *Abood v. Detroit Board of Education*, 431 U.S. at 233, 97 S.Ct. at 1798, and the two situations are very similar. Both the union employee and the integrated bar member are required by law to pay a fee. Both individuals' funds are then spent by an organization with an interest in altering the political process to its advantage. Both the union and integrated bar are occupationally homogeneous. Both groups elect representatives who are supposed to represent the entire group. Finally, both groups are comprised of members who often disagree on matters of public interest.

A distinction does arise, however, in the character of the entity to which the compelled funds must be paid. On one hand, Congress has recognized the importance of collective bargaining and the need for unions to avail themselves of the political process in the representation of their members. See *Hanson*, *supra* at 238, 76 S.Ct. at 721. In this respect, the union's need to undertake political activities is more of a necessary consequence of the collective bargaining system than an independent, compelling interest. On the other hand, the integrated Bar has been recognized by the State as possessing special training and experience with which to serve in an advisory function to the various branches of state government and to help "improve the administration of justice." While this advisory function is not the Bar's only function or even its most important function, the Bar's capacity and responsibility to advise and educate gives rise to a compelling governmental interest distinct from that of the labor union.

Justice Harlan, in his concurring opinion in *Lathrop v. Donahue*, *supra*, seized upon this distinction to support his contention that an integrated bar was conceptually no different than an appointed advisory board whose dissenting individual members would have no first amendment right to squelch such a board's majority recommendation. See *Lathrop*, 367 U.S. at 861, 81 S.Ct. at 1847. Because Florida has recognized the Bar as an arm of the judiciary, see *In re Amendment to the Integration Rule of the Florida Bar*, 439 So.2d 213, 214 (Fla.1983), this argument has some appeal. Justice Powell's concurrence in *Abood*, however, provides a more persuasive distinction between compelled support of government and a private group:

Compelled support of a private association is fundamentally different from compelled support of government. . . .

[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

431 U.S. at 259, n. 13, 97 S.Ct. at 1811 n. 13. Under this analysis, the Bar's interests are closely aligned with those of a labor union, and its lobbying activities are more accurately viewed as partisan politics than the supposedly impartial recommendation of a governmental entity.

[1569] We conclude, therefore, that the difference between the union and the integrated bar is so small that the rationale of the *Abood* case is very appropriate. See *Keller v. State Bar of California*, 181 Cal.App.3d 471, 226 Cal.Rptr. 448 (3d App.Dist.1986). The similarities between union dues and integrated bar dues are so substantial that we may safely transpose the *Abood* holding to the facts presented in this appeal as follows: the Florida Bar may use compulsory Bar dues to finance its Legislative Program only to the extent that it assumes a

political or ideological position on matters that are germane to the Bar's stated purposes.

Obviously, the recitation of this simplistic rule will be of little assistance when one of the purposes of the Bar is the amorphous "administration of justice." Transposition of the *Abood* rationale to the integrated bar works well conceptually, but the practical reality of applying that rationale is not so easy. All first amendment challenges are analyzed under a two-part test that requires a "compelling interest" and the "least restrictive means" of achieving that interest. E.g., *Chicago Teachers Union v. Hudson*, 475 U.S. —, —, 106 S.Ct. 1066, 89 L.Ed.2d 232, 245 (1986). *Abood* did nothing more than identify a proper "compelling interest" for the first step of this analysis. *Abood* did not vitiate the "least restrictive means" criterion; the Court merely defined one exceptional circumstance when compelled fees may be used to advocate views inimical to the beliefs of some union members. Wooden application of the *Abood* rule could arguably extend unlimited discretion to the Bar under its administration-of-justice function.

Accordingly, it is apparent that too much weight was given at the trial level to the Bar's compelling interest argument and not enough attention was focused upon whether the Legislative Program was conducted in the least restrictive manner available to the Bar. The evidentiary record in this appeal does not enable us to make a definitive decision on whether certain positions taken by the Bar were sufficiently related to its basic function to justify the expenditure of compulsory dues. Nor does the opinion of the trial court adequately identify specific actions taken by the Bar's Legislative Program. Indeed, the decision below was based on a review of the Bar's Policy 900, rather than analysis of past Bar positions. In an action such as this, where specific actions are challenged as contrary to the first amendment, it is not sufficient to assess the rules and procedures by which those actions were taken. The proper focus in this action should be upon the actual results of the Bar's Legislative Program, i.e., whether past positions of the Bar were sufficiently related to its purpose of improving the administration of justice. On this issue,



the Bar bears the burden of proving that its expenditures were constitutionally justified. See *Chicago Teachers Union, supra*, at —, 106 S.Ct. at 1074, n. 11, 89 L.Ed.2d at 245, n. 11.

Although further findings of fact are necessary to resolve this dispute, some discussion of appropriate Bar lobbying issues is warranted. Uncertainty and disagreement over what is a proper issue for Bar lobbying are the reasons for this dispute and for our reversal of the trial court. In such a situation, some guidance is necessary to help draw the inevitably fine lines that will arise in these cases. The Bar should construe "improving the administration of justice" as pertaining to the role of the lawyer in the judicial system and in society. The collective expertise of lawyers is grounded in their long-standing relationship with the courts. Lobbying activities that infringe upon individual rights should relate directly to that expertise.<sup>4</sup>

It should be stressed that this opinion addresses only the use of compelled fees by [1570]the Bar. *Abood* specifically noted that the union was free to politicize on *any* issue of interest to that group. See 431 U.S. at 235, 97 S.Ct. at 1799. Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. *Id.* Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.<sup>5</sup>

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4. Acceptable areas for Bar lobbying would include the following topics: (1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards.

5. Although the question of proper remedy is not before this court, this aspect of the *Abood* opinion suggests that the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program, but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they dis-

[note continued]

#### IV.

This action is therefore REVERSED and REMANDED to the district court for further proceedings consistent with this opinion.

---

agree with a Bar position, then receive that portion of their dues allotted to lobbying. [According to testimony at trial, each lawyer's share of the lobbying budget amounts to approximately \$1.50]. Lawyers would only have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right *not* to disclose his beliefs. See *Abood, supra*, at 241, n. 42, 97 S.Ct. at 1802, n. 42.

**APPENDIX D**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
& FINAL DECLARATORY JUDGMENT  
OF THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN  
DISTRICT OF FLORIDA**

**August 12, 1985**

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[Clerk's Stamp omitted in printing—Filed Aug. 12, 1985]

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

ROBERT E. GIBSON,

Plaintiff,

vs

CASE NO. TCA 84-7109-MMP

THE FLORIDA BAR, and the Members  
of the BOARD OF GOVERNORS,

Defendants.

---

FINDINGS OF FACT & CONCLUSIONS OF LAW  
&  
FINAL DECLARATORY JUDGMENT

---

This action for declaratory and injunctive relief was filed pursuant to the provisions of §1 of the Civil Rights Act of 1971, 42 U.S.C. §1983, and the Declaratory Judgment Act, 28 U.S.C. §2201 et seq. Plaintiff Robert E. Gibson alleges a denial of his right to freedom of speech and association as guaranteed by the First and Fourteenth Amendments to the United States Constitution, which denial is occasioned by the defendant The Florida Bar's practice of engaging in political activity funded with compulsory dues paid by its membership. Jurisdiction is founded upon 28 U.S.C. §1331 and 28 U.S.C. §1343(3). The following shall constitute the Court's findings of fact and conclusions of law. Rule 52(a), Fed.R.Civ.P.

The Florida Bar ("BAR") is an integrated bar established by rule of the Supreme Court of Florida in accordance with Article V, Section 15 of the Florida Constitution. Under the Integration Rule, attorneys are required to be members of the

Bar in order to practice law in Florida, and that membership is conditioned upon the payment of compulsory dues on an annual basis. Integration Rule of The Florida Bar, Arts. 2, 8. These dues are set by the Bar's Board of Governors, and are presently limited to \$140 per annum. *Id.* Art. 8. Plaintiff is a member in good standing of the Bar and pays dues as an incident thereto.

Compulsory dues represent approximately 56.8 per cent of the Bar's income; these dues are commingled with revenue from other various sources. The Bar engages in lobbying activities before the Florida Legislature and takes public positions regarding legislative and constitutional issues; approximately 2.02 per cent of the Bar's total revenue is expended for such lobbying and public advocacy.

As guidelines for engaging in the above activities, the Bar has adopted Standing Board Policy 900, which states the Bar's general legislative policy as follows:

a) The purposes of The Florida Bar are set forth in the Integration Rule. Neither The Florida Bar nor any of its committees or sections may take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Integration Rule.

b) The Bylaws of The Florida Bar set forth the restrictions on establishing a legislative policy. Article VI, Section 2 of the Bylaws provides that:

" . . . No legislative matter shall be recommended, approved, disapproved or endorsed by The Florida Bar unless such action is initiated by a written report and recommendation of a committee and approved by a majority vote of the active

members present at the [annual] meeting; or, legislative matters may be recommended, approved, disapproved, or endorsed on behalf of The Florida Bar at any time by two-thirds vote of the members of the Board of Governors present at the meeting, and during the time when the Legislature is in session the Executive Committee may act upon pending or proposed legislation.

The preamble of the Integration Rule states the purposes of the Bar as "[t]o inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence . . . ." To insure that a position taken by the Bar is related to these purposes, Standing Board Policy 900 establishes a procedure, in accordance with Article VI, Section 2 of the Bar's bylaws, through which such a determination must be made before a particular position may be adopted. Under this procedure, the Board of Governors may be called upon to adopt a particular legislative position in one of two ways: 1) a recommendation by the Bar's Legislation Committee, or 2) a motion by a member of the Board of Governors with regard to a matter previously considered by the Legislation Committee. With regard to a proposed legislative position, the Legislation Committee makes recommendations to the Board of Governors as to: 1) whether the proposed action is within the scope of the Bar's authority as set forth in the Integration Rule, and 2) what position (i.e., support, opposition, neutral) the Board should adopt.

As indicated above, consideration of a specific legislative position by the Board of Governors requires:

a) An affirmative vote of a majority of those present that the proposed legislative action is within the scope of the authority of the Florida Bar under the Integration Rule.



b) If the vote is affirmative, then a second vote will be taken to determine the specific legislative position to be adopted. Action to support, oppose or take a neutral position on the legislation shall require a two-thirds vote of the Board members present.

Standing Board Policy 900, §9.11(a)(5).

Under certain conditions when the Florida Legislature is in session, the Executive Committee may adopt specific legislative positions. To do so, however, the committee must first affirmatively establish by majority vote . . . that the legislation or legislative action being considered is on a subject matter falling within the purposes of The Florida Bar as set forth in the Integration Rule." *Id.*, §9.12(b)(2)(a). Interested persons are allowed to appear before the Legislation Committee, the Board of Governors, or the Executive Committee to express their views in support of or in opposition to legislative proposals under consideration.

The present litigation was precipitated by the Bar's taking a public stance in opposition to "Citizens' Choice on Government Revenue" ("Proposition One"), a proposed amendment to the Florida Constitution which would have limited the amount of revenue the state and other taxing entities could receive. Plaintiff Gibson personally supported Proposition One, and filed the instant complaint after the Bar publicly announced, through its president, its opposition to the measure. Subsequently the Florida Supreme Court Struck Proposition One from the 1984 general election ballot "for failure to comply with the single-subject requirement of Article XI, section 3 of the Florida Constitution". *Fine v Firestone*, 448 So.2d 984, 993 (Fla. 1984).

The controversy continues, however, as plaintiff urges that the Bar may not constitutionally expend any portion of the compulsory dues of its membership for the purpose of advocating "any position on any matter other than direct advocacy to a

judicial body". The Bar has, as demonstrated by Standing Board Policy 900, an ongoing program to advocate its positions to the legislature and the public, and argues that it may constitutionally use compulsory dues to do so "provided that the subject matter is reasonably connected with the Bar's purposes as stated in the Integration Rule".

Freedom of Association is a right which is protected under the First and Fourteenth Amendments to the United States Constitution. *Elrod v Burns*, 427 U.S. 327, 355-57, 96 S.Ct. 2673, 2680-82, 49 L.Ed.2d 547 (1976) (plurality opinion); *NAACP v Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958). This right is not absolute, however; a state may intrude into an individual's freedom of association to the extent the intrusion is justified by a compelling state interest. *Buckley v Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *United States v O'Brien*, 391 U.S. 367, 376.77, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968).

In *Lathrop v Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1960) (plurality opinion), the Supreme Court held that a state could constitutionally compel membership in an integrated bar association and the payment of annual dues as an incident to that membership. The Court specifically reserved, however, the question whether a member of that body might "constitutionally be compelled to contribute his financial support to political activities which he opposes". *Id.* at 847-48; 81 S.Ct. at 1840.

The question thus reserved was later addressed, in the context of labor union lobbying activities, in *Abood v Detroit Board of Education*, 433 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1976). In *Abood*, the Court distinguished union funds spent for lobbying with regard to "ideological activities unrelated to collective bargaining activities" from those spent for collective bargaining activities, holding that for the union to compel contributions for such lobbying activities impermissibly intruded on plaintiffs' First Amendment rights. Compelled contributions could be spent, however, in furtherance of the union's duties as

collective bargaining representatives; this intrusion of the plaintiffs' rights was found justified by the important governmental interest in peaceful labor relations:

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative . . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in [Railway Employees' Dept. v Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112] and [Machinists v Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the Hanson case, sub silentio."

Abood, 431 U.S. at 222-23, 97 S.Ct. at 1793 (footnote and citation omitted).

The Bar argues and the Court agrees, that Abood thus stands for the proposition that the State may intrude upon plaintiff's First Amendment rights where the intrusion is justified by a sufficiently important state interest, and so long as the

intrusion is "closely drawn". See Buckley v Valeo, *supra*, 424 U.S. at 24, 96 S.Ct. at 638; Falk v State Bar of Michigan, 343 N.W.2d 504, 514 (Mich. 1983). It can scarcely be doubted that the improvement of the administration of justice and the advancement of the science of jurisprudence are "sufficiently important" state interests to justify the degree of intrusion into plaintiff's rights occasioned by the Bar's legislative program.

The procedures adopted by the Bar in Standing Board Policy 900 are sufficient to insure that positions adopted by the Board are reasonably related to these important state interests. This determination is made, by necessity, from a review of the policy itself rather than an independent assessment of past positions. The Court is neither equipped nor inclined to undertake such a review; further, there is insufficient evidence in the record from which to adequately analyze the identified positions taken during the last few years. Indeed, to do so would be merely to substitute the Court's judgment for that of the Board of Governors.

Plaintiff does not suggest that the Bar has adopted positions without following its identified procedural safeguards. Further, neither he nor any identified party has been denied the opportunity to address the Board of Governors, the Legislation Committee, or the Executive Committee with regard to his views concerning any proposed position. Nor has he been deprived of his right to voice his personal views in any other manner, regardless of their content.

In sum, the Court concludes that The Florida Bar may exact dues from its membership to support those duties and functions which serve the important governmental interests established as its purposes by the Integration Rule. To the extent these interests are furthered, and within the guidelines set forth by Standing Board Policy 900, the Bar may constitutionally advocate its positions on legislative and constitutional issues.

Accordingly, it is ORDERED:

1. Request for Injunctive Relief is DENIED.
  2. The foregoing is issued as a Final Declaratory Judgment.
  3. Costs awarded to defendant upon proper motion.
- DONE AND ORDERED this 12th day of August, 1985.

/s/ Maurice M Paul  
United States District Judge

APPENDIX E

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**ORDER OF THE UNITED STATES  
COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT  
DENYING REHEARING**

October 5, 1990

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[Clerk's Stamp omitted in printing—Filed Oct. 5, 1990]

THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 89-3388

---

ROBERT E. GIBSON,

Plaintiff-Appellant,

versus

THE FLORIDA BAR and  
MEMBERS OF THE BOARD OF GOVERNORS,

Defendants-Appellees.

---

On Appeal from the United States District Court for the  
Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S)  
OF REHEARING EN BANC

(Opinion JULY 23, 1990, 11th Cir., 198 \_\_, \_\_ F.2d \_\_).  
( )

Before: TJOFLAT, Chief Judge, ANDERSON and CLARK,  
Circuit Judges.

PER CURIAM:



( √ ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat  
UNITED STATES CIRCUIT JUDGE

②  
No. 90-1102

Supreme Court, U.S.

FILED

FEB 13 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
October Term 1990

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ROBERT E. GIBSON

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*

*Respondents.*

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**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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IN THE  
**Supreme Court of the United States**  
October Term 1990

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No. 90-1102

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ROBERT E. GIBSON

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*

*Respondents.*

---

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

---

**I**

**THE FLORIDA BAR'S PROCEDURES  
MEET CONSTITUTIONAL STANDARDS.**

Petitioner does nothing more than rehash issues already resolved by this Court in *Chicago Teachers' Union v. Hudson*, 475 U.S. 292 (1986) and *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990). In direct response to this Court's opinion in *Hudson*, respondent, The Florida Bar ("the Bar"), adopted a comprehensive set of procedures governing legislative activities of the Bar, objections to such activities,

arbitration of such objections, and escrowing of the objecting member's dues. Those procedures are set out verbatim in footnote 8 to the lower court's opinion. [Pet. App. 7a] Petitioner challenges those procedures on the grounds that they fail to meet constitutional standards as announced by this Court in *Hudson* with respect to the collection, notice and objection procedures. With respect to each such ground, the Bar's procedures fall squarely within the requirements of *Hudson* and *Keller*.

**A. This Court has not required an "advance reduction" of dues in the sense suggested by petitioner and should not do so.**

The Bar's procedure allows the collection of 100 percent of a member's dues. However, immediately upon the filing of a timely objection, the Bar must deposit in an interest bearing escrow account that pro rata share of an objecting member's dues which is attributable to the legislative activities objected to. Petitioner argues that *Hudson* requires not only an escrow of the challenged funds, but in addition to the escrow, an "advance reduction" of dues. In support of its position, petitioner cites *Hudson*, in which this Court held the union's procedures inadequate despite the fact that it had established both an advance reduction in dues and a 100 percent escrow.

Petitioner reads too much into the *Hudson* opinion. While this Court discussed an advance reduction in dues because the union in that case had such a reduction, the Court never held an advance reduction to be necessary. To the contrary, in the Court's summary of constitutional requisites, advance reduction of dues is conspicuously absent:

We hold today that the constitutional requirements for the Union's collection of agency fees include an

adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

*Chicago Teachers' Union v. Hudson*, *supra* at 475 U.S. 310.

A requirement that the Bar provide an advance reduction of dues would be both burdensome and impracticable. Such a requirement would be of little significance at all if The Florida Bar were advised by the Supreme Court of Florida, in pending proceedings, noted *infra*, that the Bar has no authority to engage in activities beyond the *Keller* scope. Otherwise, such requirement would be burdensome because of the necessity for the Bar to engage in a constitutional analysis and an accounting before taking a position on any measure and, presumably, before modifying such position on any measure, a difficult if not impossible task given the dynamics of the legislative process. In addition, legislative issues will inevitably arise after dues have already been collected.

The suggestion that an advance reduction of dues should be required ignores the constitutional principles which underlie the entire question before the Court. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 782, 52 L.Ed. 2d 261 (1977), this Court upheld the constitutionality of compulsory dues collection. The constitutional infirmities subsequently addressed in *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984) and *Chicago Teachers' Union v. Hudson*, *supra*, were not in the collection of dues, but in their expenditure. The remedies were designed to ensure that dues already collected were not spent over objection for constitutionally impermissible purposes.

Any notion that an advance reduction is required was disabused by this Court's recent opinion in *Keller v. State Bar*



of *California, supra*. For a state bar which cannot represent that it can properly engage in any activities beyond *Keller's* scope, and whose ability to do so is at issue before its parent court, there is no practical opportunity for advance dues reduction or to consult past expenditures. Given The Florida Bar in its present posture, an advance reduction of dues would necessitate a bill-by-bill, case-by-case analysis by the Bar. In *Keller* the Court dismissed the suggestion that such an analysis was necessary, stating:

In declining to apply our *Abood* decision to the activities of the State Bar, the Supreme Court of California noted that it would entail "an extraordinary burden . . . . The bar has neither time nor money to undertake a bill-by-bill, case-by-case Ellis analysis, nor can it accept the risk of litigation every time it decides to lobby a bill or brief a case." 47 Cal. 3d, at 1165-1166. 767 P.2d at 1028. In this respect we agree with the assessment of Justice Kaufman in his concurring and dissenting opinion in that court:

[C]ontrary to the majority's assumption, the State Bar would not have to perform a three-step Ellis analysis prior to each instance in which it seek to advise the Legislature or the courts of its views on a matter. Instead, according to [Teachers' v.] Hudson, [475 U.S. 292 (1986)] 'the constitutional requirements for the [Association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pendings.' *Id.* at 310.

\* \* \*

We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*.

*Id.* at 2237.

**B. The Florida Bar provides an adequate explanation of the basis for the amount of dues assessed.**

Petitioner contends that The Florida Bar violates constitutional standards by failing to provide adequate timely information about the basis for dues. Petitioner erroneously states that the only explanation given by the Bar is "periodic notices that the Bar has taken a legislative position." The Rules Regulating The Florida Bar require notice of each stage of the process of developing the budget and notice of the budget itself. [Res. App.]<sup>1</sup> In addition, the Bar annually publishes a complete breakdown of expenditures by specific category, including legislation, giving percentage of the total budget and percentage and dollar amount of dues devoted to each category. That presentation includes the specific per capita member cost of The Florida Bar's legislative programming. [Res. App.]<sup>2</sup> The requirement for notice of the budget breakdown is in addition to the requirement for notice of legislative positions. That notice must be published in The Florida Bar News, a publication sent to every member of the Bar, in the issue immediately following the Board meeting at which such positions are adopted. Rule 2-9.3, Rules Regulating The Florida Bar. [Res. App.]

<sup>1</sup>The Rules — specifically Bar Rules 1-7 and 2-6 — were adopted as an opinion of the Florida Supreme Court at 494 So.2d 977 (Fla. 1986).

<sup>2</sup>The excerpts from the Bar Journal were before the Eleventh Circuit on an undisputed motion to take judicial notice.

It is difficult to understand how petitioner reaches the conclusion that The Florida Bar provides less information than did the union in *Hudson*. In that case, the union provided no information on any expenditures except the five percent of dues which the union used for legislative advocacy. The Florida Bar, on the other hand, provides a breakdown of all dues expenditures and the potential dues reimbursement figure for prospective dissenters.

**C. The Florida Bar's procedure for registering objections to legislative positions meets constitutional standards.**

The Rules Regulating The Florida Bar provide that:

Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue. Rules Regulating The Florida Bar, 2-9.3(c).

[Pet. App.] Petitioner asserts that requiring an objecting member to object on an issue-by-issue basis is unconstitutional because it forces such member to identify his or her own political positions. The lower court rejected the contention, noting that the Florida rule does not require the objector to disclose his or her position on an issue, only to identify the issue as one alleged to be outside the scope of permissible expenditures. Thus, the burden on the objecting member is minimal. Such a requirement does not disclose the objector's political position on any issue and would be no more likely to subject the objector to political repercussion than a general objection to all lobbying. On the other hand, if a member were

permitted to make a general objection, an unfair burden would be placed upon all non-objecting members of the Bar. The Bar would be faced with the choice of either making a full refund to objecting members, regardless of the merit of their objection, or funding the cost of a full arbitration proceeding on every presumptively valid issue on which the Bar chose to take a position.

**D. Florida Bar Procedures give members adequate notice and timely opportunity to object on legislative matters, for appropriate reimbursement.**

Petitioner complains that the Bar does not give notice and an opportunity to object prior to collection of dues. As noted above, the Bar does provide members with a detailed breakdown of dues expenditures prior to collection, and provides members with an opportunity to object and have an appropriate portion of their dues escrowed for possible reimbursement. Under proposed Florida Bar rule amendments consistent with the lower court's opinion, such reimbursement would include interest at the statutory rate, calculated from the date of receipt of the objector's dues payment.<sup>3</sup>

The impracticability of pre-collection notice is apparent since the Bar cannot know what political or legislative issues will arise after the collection of dues. Based upon petitioner's premise, the Bar would be prohibited from taking a position on any issue after collection of dues regardless of how compelling the Bar's interest in such issue might be. Constitutional standards do not necessitate the unreasonable consequences demanded by petitioner.

<sup>3</sup>The Florida Bar Re Petition to Amend Rules Regulating The Florida Bar — Bylaws 2-3.10 and 2-9.3, petition filed, Un-numbered (Sup. Ct. Fla., Jan. 3, 1991)



## II

**THE CIRCUIT COURT DID NOT ERR IN  
DECLINING TO REMAND FOR ASSESS-  
MENT OF RETROACTIVE MONETARY  
DAMAGES.**

For the first time in this action, petitioner sought retroactive damages from the Circuit Court, asking the Court to remand for the assessment of a refund of a portion of dues which he had already paid. The Circuit Court declined to do so, noting that the request was being made at the appellate level for the first time. The Court noted that no request for refund or monetary damages was included in the complaint and no evidence on the issue was introduced in the District Court either at trial or on remand. Petitioner argues that even though the complaint did not specifically seek monetary damages, a complaint is deemed to include a prayer for all relief to which a plaintiff is entitled. While petitioner is correct as to this general principle of law, he misses the point underlying the circuit court's refusal to remand. It is a fundamental principle of appellate law that a point cannot be raised for the first time on appeal. *Fries v. Chicago and Northwestern Trans. Co.*, 909 F.2d 1092 (7th Cir. 1990); *U.S. v. Bigler*, 817 F.2d 1139 (5th Cir. 1987); *Sanders v. Int'l Ass'n. of Bridge, etc.*, 546 F.2d 879 (10th Cir. 1976).

Even if the petitioner had raised the issue of retroactive monetary relief at the trial level, he would not have been entitled to it. The Eleventh Amendment to the United States Constitution bars federal jurisdiction to award retroactive damages against states or state agencies. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed 2d 662 (1974); *Pennhurst State School & Hospital v. Terry Lee Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed 67 (1983). Florida has not

waived sovereign immunity for purposes of federal jurisdiction. Section 768.28(16), Florida Statutes: *Florida Department of Health, etc. v. Florida Nursing Homes Assn.*, 450 U.S. 147, 101 S.Ct. 1032, 67 L.Ed. 132 (1981).

For purposes of the Eleventh Amendment, The Florida Bar is clearly a "state agency". By order of the Florida Supreme Court, pursuant to Article V, Section 15, Florida Constitution, The Florida Bar is "an official arm of the Court." Chapter 1, Rules Regulating The Florida Bar. See *Krempp v. Dobbs*, 775 Fed.2d 1319 (5th Cir. 1985). The fact that Gibson is seeking a rebate of previously paid dues is of no consequence since the Eleventh Amendment bars rebates of funds exacted by a state under compulsion. See *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed 2d 1140 (1988); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S.Ct. 873, 86 L.Ed. 1121 (1944).

## III

**THE ISSUES RAISED BY PETITIONER  
ARE NOT RIPE FOR CONSIDERATION BY  
THIS COURT.**

This Court has instructed the Federal judiciary to exercise restraint in reviewing state statutes in the interest of comity. The concept of allowing states an adequate opportunity to interpret their own laws prior to federal intervention was initially advanced in the *Pullman* abstention doctrine. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). While *Pullman* may not technically apply in the circumstances of the instant case, its underlying principle does.

The Florida Bar, and other bar associations across the country, have acted expeditiously to bring their procedures into



compliance with the *Hudson* requirements. In the interest of both comity and judicial efficiency the District Court reserved judgment in this case in order to allow the Florida Supreme Court time to adopt new rules. Those rules were adopted and approved by the District Court prior to this Court's decision in *Keller*. Petitioners now seek reversal by this Court before the Bar and Florida Supreme Court have had breathing room to consider the impact of *Keller*.

As noted above, the Bar believes its current rules are in line with *Hudson* and *Keller*. Nevertheless, in two separate original proceedings before the Supreme Court of Florida, the post-*Keller* authority of The Florida Bar to engage in political and ideological activities under state law may be clarified<sup>4</sup> and further amendment of its member dissent procedures is in process.<sup>5</sup> The Respondent cannot faithfully represent to this Court that The Florida Bar's present rule has the continued support of its own parent agency since rendition of *Keller*. Consequently, this Court should allow Florida and other states an adequate opportunity to review their rules in light of *Keller* prior to revisiting the issue.

<sup>4</sup>*The Florida Bar, In Re: David P. Frankel, petition filed, No. 76,853 (Sup. Ct. Fla., Oct. 29, 1990).*

<sup>5</sup>*The Florida Bar Re Petition to Amend Rules Regulating The Florida Bar — Bylaws 2-3.10 and 2-9.3, petition filed, Un-numbered (Sup. Ct. Fla., Jan. 3, 1991).*

## CONCLUSION

For the foregoing reasons, The Florida Bar respectfully urges that the Petition for Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.  
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OFFICE OF THE CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

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February 1991

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## ARGUMENT

### I. THE BAR'S SUGGESTION THAT THE QUESTIONS PRESENTED ARE NOT RIPE IS DISHONEST, BECAUSE THE PROCEEDINGS IN THE FLORIDA SUPREME COURT WILL AFFECT NONE OF THOSE ISSUES

In the Brief in Opposition ("Opp.") at 9-10, respondent Florida Bar ("the Bar") argues that the "principle" of abstention applies here, because, it says, the questions of federal constitutional law presented by this case are not ripe for consideration by this Court. The Bar explicitly represents that, in one pending proceeding, *Florida Bar Re David P. Frankel*, No. 76-853 (Fla. filed Oct. 29, 1990), the Florida Supreme Court may determine "under state law" that "the Bar has no authority to engage in activities beyond" those which as a matter of federal constitutional law under *Keller v. State Bar*, 110 S. Ct. 2228 (1990), it can compel objecting members to subsidize. Opp. at 3, 10. The Bar also implicitly represents that, in another pending proceeding, *Florida Bar Re Petition to Amend Rules Regulating the Florida Bar - Bylaws 2-3.10 and 2-9.3* (Fla. filed Jan. 3, 1991), the Florida Supreme Court may make "further amendment of its member dissent procedures" that would moot the questions presented here. Opp. at 9-10. *Both representations are false.*

The Bar's petition and proposal for amending its rules are reproduced as Appendix A hereto. Approval of the amended rules in their entirety would moot *none* of the questions presented here concerning the constitutionality of the Bar's rules, *i.e.*, whether pre-collection reduction and pre-collection notice are necessary, and whether multiple, specific objections can be required of dissenting members. The Bar's rules would still provide *neither* pre-collection reductions in the dues of nonmembers who object to the use of their compulsory bar dues for constitutionally nonchargeable purposes *nor* pre-collection notice to all nonmembers of the basis for the reduced dues amount. The rules also would *continue* to require members to object every time that the Bar engages in nonchargeable activity that they do not wish to subsidize.



The pertinent part of the Amended Petition in *Frankel* is reproduced as Appendix B hereto.<sup>1</sup> It does *not* ask the Florida Supreme Court to rectify as a matter of state law the existing limits on the Bar's authority to engage in activity, as the Bar misrepresents. The *only* issue of state law that *Frankel* raises is whether eight specific legislative positions taken by the Bar fall outside the guidelines adopted in *Florida Bar Re Schwarz*, 552 F.2d 1094, 1098 (Fla. 1989), *cert. denied*, 111 S. Ct. 371 (1990), for "determining the scope of permissible lobbying activities of The Florida Bar" under state law. *Frankel* does challenge part of those guidelines, and the Bar's rule prohibiting general objections, but as a matter of *federal* constitutional law, not state law. And, "[a]bstention cannot be ordered simply to give state courts the first opportunity to vindicate [a] federal claim," particularly not a first-amendment claim. *Zwickler v. Koota*, 389 U.S. 241, 251-52 (1967).

Thus, petitioner Robert Gibson's claim for injunctive relief is not even potentially mooted by either proceeding currently pending in the Florida Supreme Court.

Moreover, this Court must "consider the procedure as it was presented to the District Court. It is clear that 'voluntary cessation of allegedly illegal conduct does not moot a case.'" *Teachers Local 1 v. Hudson*, 475 U.S. 292, 305 n.14 (1986). Even if the Florida Supreme Court were *sua sponte* to correct in the future all of the constitutional defects in the Bar's scheme, Mr. Gibson sought money damages in this action. *See infra* p. 8. "[D]amages for an illegal rebate program would necessarily have been in the form of interest on money illegally held for a period of time," *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984), as well as the portion of his dues expended for nonchargeable purposes. "That claim for damages remains in the case," which thus "is not moot," no matter how small the amount at issue. *Id.*

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<sup>1</sup> The remainder of that Petition, which is 19 typed pages long, consists of legal argument and a prayer for relief consistent with the Introduction and argument headings reproduced in Appendix B.

## II. THE BAR IGNORES THE DIRECT CONFLICTS AMONG THE CIRCUITS ON THE QUESTIONS OF PRE-COLLECTION REDUCTION, PRE-COLLECTION NOTICE, AND SPECIFICITY OF OBJECTION

Part I of the Opposition argues the merits of the constitutionality, under *Hudson*, of the Bar's procedures for accomodating members who may want to object to the collection of compulsory dues for constitutionally nonchargeable purposes. Significantly, the Bar never mentions the opinion of Circuit Judge Clark, who dissented from the decision of the court of appeals on all of the questions presented as to those procedures, *i.e.*, whether pre-collection reduction and notice are necessary, and whether multiple, specific objections can be required. *See* Petition Appendix ("App.") at 17a-21a.

Even more significantly, the Bar deliberately ignores the decisions of other courts of appeals applying *Hudson*, all but one of which were cited in the Petition, that directly conflict with the decision in this case on one or more of those three questions: *Dean v. TWA*, 136 L.R.R.M. (BNA) 2273, 2275 (9th Cir. Jan. 22, 1991) (pre-collection notice required); *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir. 1990) (pre-collection reduction and notice both required); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634-35 (1st Cir. 1990) (pre-collection notice required, specific objections cannot be required); *Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987) (pre-collection reduction and notice both required); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-05 (6th Cir. 1987) (same).

Those decisions belie the Bar's boast that its "procedures fall squarely within the requirements of *Hudson* and *Keller*." Opp. at 2. They also show that the Eleventh Circuit's interpretation of the first-amendment procedural safeguards that *Hudson* and *Keller* require is diametrically opposed to that of three other courts of appeals. Review by this Court is plainly warranted for that reason alone.

### III. THE BAR'S ARGUMENT CONCERNING THE PROCEDURAL SAFEGUARDS REQUIRED BY HUDSON AND KELLER REWRITES THOSE DECISIONS AND TRIES TO SHIFT THE BURDEN OF PROTECTING FIRST-AMENDMENT RIGHTS FROM THE BAR TO ITS INDIVIDUAL MEMBERS

#### A. Pre-Collection Reduction of the Dues Amount

The Bar argues that *Hudson* did not hold that the First Amendment requires advance reduction of the dues charged to dissenters, as well as escrow of disputed amounts, "because the union in that case had such a reduction." Opp. at 2. However, *Hudson* explicitly held that the "appropriately justified advance reduction \* \* \* [is] necessary to minimize both the impingement [of the agency shop on employees' first-amendment interests] and the burden" of objection. It would hardly have been necessary for the Court to hold that the union must "provide adequate justification for the advance reduction of dues," *Hudson*, 475 U.S. at 309 (emphasis added), if no advance reduction at all were required.

*Hudson* was not, as the Bar urges, Opp. at 3, concerned only with misspending. Were that true, *Hudson*, 475 U.S. at 310 (emphasis added), need not have announced "constitutional requirements for the Union's collection of agency fees," and would have required only *post*-collection protections. But it required more. The union there had a 100% escrow, which the Court agreed "eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes." *Id.* at 309. Nonetheless, the Court did not hold that the only other safeguard needed was an impartial decisionmaker to determine how much the union could lawfully spend.

Rather, *Hudson* also required *pre*-collection protections: an "appropriately justified advance reduction" to an amount that includes only clearly or arguably chargeable costs and advance disclosure of the basis for that amount. *See id.* at 306-07, 309-10. The Court found pre-collection safeguards necessary for two

reasons: first, "because the agency shop *itself*" —i.e., the collection of compulsory union fees—"impinges on the nonunion employees' First Amendment interests," *id.* at 309 (emphasis added); and, second, because "the procedures required by the First Amendment also provide the protections *necessary* for any deprivation of property," *id.* at 304 n.13 (emphasis added).

#### B. Pre-Collection Notice

*Hudson*, 475 U.S. at 306, requires "that the potential objectors," in this case all Florida attorneys, "be given sufficient information to gauge the propriety of the [compulsory] fee." The Bar contends that it meets this requirement, because it provides members notice of its budget and "annually publishes a complete breakdown of expenditures by specific category," with percentages and dollar amounts. Opp. at 5.

However, *Hudson*, 475 U.S. at 306-07, held that to be adequate the disclosure must "identif[y] the expenditures for collective bargaining and contract administration \* \* \* for which nonmembers as well as members can fairly be charged a fee." Merely furnishing a copy of a union's basic financial statement or budget does not satisfy that requirement. *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986), *aff'd on other grounds*, 881 F.2d 1388 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 2616 (1990). The notice must explain which expenditures the organization demanding the fee considers chargeable and why: "The whole point of providing the notice [to] nonmembers was to give them enough information to decide whether to challenge the fair share fee. That would require a breakdown between chargeable and nonchargeable costs." *Hohe*, 727 F. Supp. at 167; *see Tierney*, 824 F.2d at 1504.

The Bar's budget and "breakdown" of expenses do not meet that requirement, because, like the financial statements and budgets found inadequate in *Hohe* and *Lehnert*, they do not identify expenses as chargeable or not. Appendix C hereto is the breakdown, published in the September, 1988, *Florida Bar*



*Journal*, which was attached to the Bar's brief in the court of appeals. It reveals only what the Bar spends in total on, e.g., "Public Information," "Public Interest Programs," and "Legislation." It does *not* anywhere give "the potential dues reimbursement figure," as the Opposition at 6 disingenuously says. Nor does it tell potential objectors the portions of the categories that the Bar considers chargeable, much less "the reasons why they were required to pay their share of" those expenditures, as *Hudson*, 475 U.S. at 307, mandates.

### C. The Objection Requirement

The Bar cites no authority, other than the panel majority's decision, for the proposition that it can "requir[e] an objecting member to object on an issue-by-issue basis," Opp. at 6, despite the holding of *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977), directly to the contrary. The Bar also ignores one of the two reasons given by *Abood* for holding that a requirement of issue-by-issue objections is unconstitutional: "It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its" chargeable activities. *Id.* Nor does the Bar deny that precisely the same burden is placed on potential objectors here.

Instead, the Bar tries to justify imposing that burden on the individual, by asserting that the general objections approved in *Abood* would somehow place on it "an unfair burden" of "either making a full refund to objecting members, regardless of the merit of their objection, or funding the cost of a full arbitration proceeding on every" legislative or political issue on which the Bar presumes that it can spend objectors' dues. Opp. at 7. That argument is disingenuous, because the Bar has precisely that burden under its existing scheme. That is, if a member opposes use of his dues for any constitutionally nonchargeable purpose (as Mr. Gibson does, see App. at 2a), carefully monitors the Bar's publication twice a month to determine when it engages in arguably nonchargeable activity, and objects and specifies the activity every time it does, then, under its own scheme, the Bar

must either refund for all of those activities or pay for arbitration on every issue that he has challenged.

In short, the Bar's preference for multiple, specific objections can only be for the purpose of *discouraging* dissent. That purpose is, of course, contrary to not only *Abood*, but also *Hudson*, 475 U.S. at 307 n.20 (emphasis added), which mandates that the Bar provide procedures "that *facilitate* a [member's] ability to protect his rights."

### D. The Imagined Burden of Advance Reduction and Notice Is a Constitutionally Impermissible Consideration

The Bar also complains that pre-collection calculation and disclosure of the reduced dues amount would be "burdensome and impracticable." The Bar asserts that *Keller* somehow relieved it of that burden. Opp. at 3, 7. The Bar's complaint is bootless both in principle and as to *Keller*. In general, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); see *Ellis*, 466 U.S. at 444. *Keller* applied, not repudiated, that rule.

*Keller* agreed that "'the State Bar would not have to perform the three-step *Ellis* analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter.'" However, it also held that the "'burden or inconvenience'" of performing that analysis once a year for all of its expenditures and giving it to all members *before* collecting their annual dues "'is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 110 S. Ct. at 2237 (quoting *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 255 Cal. Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., dissenting)) (emphasis added); see *Hudson*, 475 U.S. at 306-07. Because that analysis can be based on expenditures *during the prior year*, the Bar need not "know what political and legislative issues will arise after the collection of dues," as the Opposition at 7 imagines. See *Hudson*, 475 U.S. at 307 n.18.



**IV. GIBSON'S CLAIM FOR MONETARY DAMAGES WAS NOT RAISED FOR THE FIRST TIME ON APPEAL AND IS NOT BARRED BY THE ELEVENTH AMENDMENT**

The Bar concedes, as it must under *Abood*, 431 U.S. at 241-42 & n.43, that Mr. Gibson's complaint, which included a prayer for all relief to which he is entitled, was sufficient to constitute a claim for monetary damages. However, it misrepresents the record when it says that he requested refund of the portion of his dues expended for nonchargeable purposes "at the appellate level for the first time." Opp. at 8.

Gibson's motion for injunctive relief pending final hearing said that a "money judgment" in the form of a rebate of the part of his dues "used for ideological purposes" was "clearly required" in addition to injunctive relief. Dist. Ct. Record ("R.") 40 at 4-5. His response to the Bar's motion for final judgment explicitly requested that the Bar's motion be denied, because it was "necessary for the Court to receive further evidence" on issues other than the constitutionality of the Bar's rebate scheme before final judgment could be entered, "particularly damages for past improper uses of GIBSON's funds." R. 46 at 11. And, his contention that "the element of damages" remained and "require[d] an evidentiary hearing" was repeated when he renewed his motion for injunctive relief. R. 56 at 13.

In short, Gibson did not fail to raise the issue of damages in the district court on remand from the court of appeals' first decision. He raised it repeatedly and requested an evidentiary hearing on the issue, but was denied that hearing when the district court held that the Bar's scheme satisfied *Hudson*, denied his motion for injunctive relief, and dismissed the case on the erroneous ground that "no subsequent proceedings are necessary." App. at 22a-23a.

The Bar argues alternatively that it is "a 'state agency'" and, as such, immune from damages under the Eleventh Amendment.

Opp. at 8-9. While that was questionable even before *Keller*,<sup>2</sup> it is clearly not true now.

*Keller*, 110 S. Ct. at 2234, held that the California Supreme Court's ruling that the California Bar is a state agency is "not binding on us when such a determination is essential to the decision of a federal question." What is a state agency for purposes of the First or Eleventh Amendment clearly is a federal question. *Keller*, 110 S. Ct. at 2234-35, held that the California Bar is not a "government agency" for purposes of federal constitutional law, "render[ing] unavailing [the] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." The Florida Bar possesses all of the characteristics on which *Keller* relied:

- "Its principal funding comes not from appropriations made to it by the legislature, but from dues levied on its members" by the Bar. *Id.* at 2234; see Fla. Stat. Ann., Rules Regulating Bar 1-7 (West Supp. 1990).
- "Only lawyers admitted to practice in the State of California are members of the State Bar, and all \* \* \* lawyers admitted to practice in the State must be members." *Keller*, 110 S. Ct. at 2234-45; see Fla. Stat. Ann., Rules Regulating Bar 1-3 (West Supp. 1990).

---

<sup>2</sup> *Levine v. Wisconsin Supreme Court*, 679 F. Supp. 1478, 1487-88 (W.D. Wis.), *rev'd on other grounds sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989), held that the Wisconsin Bar is not a state agency immune under the Eleventh Amendment from damages for the misuse of compulsory dues, because its funds are not deposited in state accounts and "it is largely a self-governing entity." In contrast, *Krempp v. Dobbs*, 775 F.2d 1319, 1321 & n.1 (5th Cir. 1985), held, with far less analysis, that the Texas Bar is a state agency immune from suit. *Levine*, 679 F. Supp. 1488 & n.3, distinguished *Krempp* on the ground that the Texas Bar is a state agency by virtue of state statute, unlike the Wisconsin (and Florida) Bar, which has that status under state law only by declaration of the state's supreme court. See Opp. at 9. Under *Keller*, even compulsory state bars which have "state agency" status by virtue of statute probably have no immunity in a suit such as this.

- The services provided "for the State by way of governance of the profession" are "essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by \* \* \* law to the State Supreme Court." *Keller*, 110 S. Ct. at 2235; see Fla. Const. art. 5, § 15; Fla. Stat. Ann., Rules of Sup. Ct. Relating to Admissions to Bar (West 1983 & Supp. 1990); Fla. Stat. Ann., Rules Regulating Bar 1-10, 3-1.2, 3-3.1, 3-7.6 (West Supp. 1990).

In sum, *Keller* conclusively establishes that the Florida Bar has no eleventh-amendment immunity in this action.

### CONCLUSION

The petition should be granted as to all questions presented.

Respectfully submitted,

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February 1991

## **APPENDICES**

**APPENDIX A**

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR RE  
PETITION TO AMEND  
RULES REGULATING THE  
FLORIDA BAR - BYLAWS  
2-3.10 AND 2-9.3**

---

**CASE NO.**

**NOTICE OF BYLAW AMENDMENT**

THE FLORIDA BAR upon authorization of its board of governors and pursuant to rule 2-10.1, Rules Regulating The Florida Bar, hereby notices the court of bylaw amendments and shows:

1. This notice is authorized by the Board of Governors of The Florida Bar.
2. November 30, 1990, the Board of Governors of The Florida Bar amended bylaws 2-3.10 and 2-9.3. A copy of the amended bylaws is attached as exhibit A.
3. Notice of these amendments was published in the January 1, 1990 edition of The Florida Bar News. A copy of the publication is attached as exhibit B.
4. Simultaneously with the filing of this notice, the Bar files a motion for extension of time to allow comments from members through and including February 1, 1991.

WHEREFORE, The Florida Bar prays the court will allow these bylaw amendments to become effective fifty (50) days after publication, as provided in rule 2-10.1 (f).

[signature block omitted]



## EXHIBIT A

[Certification omitted]

[Italicized text was underlined in the original to show additions;  
text struck through is as in the original to show deletions]

### 2-3.10 Meetings.

The board of governors shall hold six (6) regular meetings each year, at least one of which shall be held at The Florida Bar Center. Subject to the approval of the board of governors, the places and times of such meetings shall be determined by the president, who may make such designation while president-elect. Special meetings shall be held at the direction of the executive committee or the board of governors. Any member of The Florida Bar in good standing may attend meetings at any time except during such times as the board shall be in executive session concerning disciplinary matters, personnel matters, *member objections to legislative positions of The Florida Bar*, or receiving attorney-client advice. Minutes of all meetings shall be kept by the executive director.

### 2-9.3 Legislative policies.

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the Board meeting at which the positions were adopted.

(c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. *The identity of an objecting member shall be confidential unless made public by The Florida Bar or any arbitration panel constituted under these rules upon specific request or waiver of the objecting member.* Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(3) *In the event the Board of Governors orders a refund, the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow for the duration of the fiscal year and until the conclusion of The Florida Bar's annual audit as provided in rule 2-6.16, which shall include final independent verification of the appropriate refund payable. The Florida Bar shall thereafter pay such refund within thirty (30) days of independent verification of the amount of refund, together with interest calculated at the statutory rate of interest on judgments as of the date the objecting member's dues at issue were received by The Florida Bar, for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.*

(d) Composition of arbitration panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as practicable following the decision by the board of governors that a matter shall be referred to arbitration.

The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member, and those two (2) members shall choose a third member of the panel who shall serve as chairman. In the event the two (2) members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the Board of Governors that the matter shall be referred to arbitration, The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. *Venue for any arbitration proceedings conducted pursuant to this rule shall be in Leon County, Florida, however, for the convenience of the parties or witnesses or in the interest of justice, the proceedings may be transferred upon a majority vote of the arbitration panel. The chairman of the arbitration panel shall determine the time, date and place of any proceeding and shall provide notice thereof to all parties. The arbitration panel shall thereafter confer and decide whether The Florida Bar proved by the greater weight of evidence that the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.*

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of

evidence. *If requested by an objecting member who is a party to such proceedings, such party and counsel, and any witnesses may participate telephonically, the expense of which shall be advanced by the requesting party.* The decision of the arbitration panel shall be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel shall order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the Board of Governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, *the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow until paid. Within thirty (30) days of independent verification of the amount of refund, The Florida Bar shall provide such refund ~~within thirty (30) days of~~ together with interest calculated at the ~~legal~~ statutory rate of interest on judgments as of the date the ~~written objection was~~ objecting member's dues at issue were received by The Florida Bar, for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.*

(5) *Each arbitrator shall be compensated at an hourly rate equal to that of a circuit court judge based on services performed as an arbitrator pursuant to this rule.*

(6) *The arbitration panel shall tax all legal costs and charges of any arbitration proceeding conducted pursuant to this rule, to include arbitrator expenses and compensation, in favor of the prevailing party and against the nonprevailing party. When there is more than one party on one or both sides of an action, the*

*arbitration panel shall tax such costs and charges against nonprevailing parties as it may deem equitable and fair.*

*(7) Payment by The Florida Bar of the costs of any arbitration proceeding conducted pursuant to this rule shall not be considered to be an expense for legislative activities.*

[Exhibit B omitted]

**APPENDIX B**

[Clerk's stamp omitted - filed Nov. 5, 1990]

**IN THE  
SUPREME COURT OF FLORIDA**

THE FLORIDA BAR  
Re David P. Frankel

CASE NO. 76-853

**INTRODUCTION TO AMENDED PETITION**

PETITIONER, David P. Frankel, Esquire, is an active member in good standing of The Florida Bar. PETITIONER submits this Amended Petition because he questions the propriety of eight recommendations pertaining to a legislative position adopted by the Board of Governors (the "Board") of The Florida Bar during its meeting of October 4, 1990 and officially noticed to the Bar membership in the October 15, 1990 issue of The Florida Bar News.

PETITIONER comes before the Supreme Court of Florida, in accordance with this Court's statement in The Florida Bar re Schwarz, 552 So.2d 1094, 1097 (Fla. 1989) (hereinafter "Schwarz"), that "any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court." PETITIONER, as set forth more fully below, petitions this Court for a declaration that the eight recommendations pertaining to the legislative position discussed in this Amended Petition are improper when considered against the standards adopted by this Court in Schwarz. Petitioner further petitions this Court for a declaration that the "additional criteria" adopted in Schwarz are violative of the First and Fourteenth Amendments to the United States Constitution, both by their express language and as applied. PETITIONER further petitions this Court to issue an order enjoining The Florida Bar,

[Footnotes omitted]



both pendente lite and thereafter, from engaging in any lobbying activities pertaining to the eight recommendations discussed in this Amended Petition, as well as any lobbying activities not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar. Finally, PETITIONER urges the Court to order The Florida Bar to recognize general objections made by Bar members who object to the Bar's spending any portion of their compulsory Bar dues on legislative lobbying activities or amicus brief filings.

**THE FLORIDA Bar CANNOT SUSTAIN ITS BURDEN OF PROOF THAT THE LEGISLATIVE POSITIONS AT ISSUE SATISFY THE STANDARDS ADOPTED BY THE SUPREME COURT OF FLORIDA IN SCHWARZ.**

\* \* \* \*

**THE THREE "ADDITIONAL CRITERIA" ADOPTED IN SCHWARZ VIOLATE THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF DISSENTING Bar MEMBERS TO BE FREE FROM COMPELLED SPEECH AND ASSOCIATION**

\* \* \* \*

**IN ACCORDANCE WITH ESTABLISHED PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES, THE FLORIDA BAR IS REQUIRED TO RECOGNIZE ITS MEMBERS' GENERAL OBJECTIONS TO THE USE OF THEIR COMPULSORY DUES TO FUND LEGISLATIVE LOBBYING ACTIVITIES AND IS FURTHER REQUIRED TO PROVIDE REFUNDS FOR SUCH GENERAL OBJECTIONS**

\* \* \* \*

## **APPENDIX C**

### **Financial Organization**

The Florida Bar's 1988-89 operating budget is \$12.8 million. Membership dues account for only 49%, or \$5.9 million, of that amount.

The additional \$5.9 million in revenues comes from nondues sources, generated by various Bar programs and member services such as: sale of commercial ad space in *The Florida Bar Journal* and *News*, sale of public information brochures, subscription to the *Case Summary Service*, rental of exhibit space at Bar meetings, and through Florida Supreme Court orders directing disciplined lawyers to pay prosecution costs.

A breakdown of the 1988-89 General Fund budget reflects all Bar programs costs, including support services and overhead.

Under special guidelines, the Bar's legislative program is considered to be funded entirely from member dues. The legislative budget of \$320,247 divided by the July 1, 1988 members in good standing of 42,974 give a cost per member of the legislative program of \$7.45.

The Florida Bar was the first state bar association to implement a cost allocation system for its various programs and activities with all costs other than General Administration, Board and Officer, and Planning and Evaluation being allocated to the end users based on the best available measure of usage. With a watchful eye toward expenditures and efficiency, Bar leadership and staff have implemented the system to monitor program expenses carefully. Prior to final adoption by the Board of Governors, the proposed Florida Bar operating budget is printed in *The Florida Bar News*. In addition, members are provided an opportunity to comment on the proposed budget at statewide hearings held by the Bar's Budget Committee.

An audit of all Florida Bar finances is conducted at the end of each fiscal year by an independent auditing firm, under the supervision of the Audit Committee, and a report is published in *The Florida Bar News* for members' review.

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**1988-89 General Fund Budget Statistics**

	<b>Percentage of Total Budget</b>	<b>Percentage of Dues Support</b>	<b>Amount of Dues Dollar Support</b>
Lawyer Regulation	30.7%	50.2%	\$ 70.28
UPL	1.8%	3.0%	\$ 4.20
CSF	<u>2.4%</u>	<u>4.0%</u>	<u>\$ 5.60</u>
	34.9%	57.2%	\$ 80.08
Journal & News	7.8%	0.9%	\$ 1.26
Public Information	4.8%	7.2%	\$ 10.08
Public Interest Programs	3.6%	4.9%	\$ 6.86
Meetings & Convention	4.2%	1.8%	\$ 2.52
Committees & Other			
Activities	5.1%	6.9%	\$ 9.66
Section Administration	4.0%	2.8%	\$ 3.92
CLE Programs	15.5%	-0-	-0-
Legal Publications	9.2%	-0-	-0-
Legislation	2.7%	4.5%	\$ 6.30
Administration	<u>8.2%</u>	<u>13.8%</u>	<u>\$ 19.32</u>
	100.0%	100.0%	\$140.00

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No. 90-1102

Supreme Court, U.S.

FILED

FEB 8 1991

OFFICE OF THE CLERK

In The  
Supreme Court of the United States  
October Term, 1990

ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, et al.,

*Respondents.*

Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

BRIEF AMICUS CURIAE  
IN SUPPORT OF PETITIONER

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No. 90-1102

In The

## Supreme Court of the United States

October Term, 1990

ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, et al.,

*Respondents.*

Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

BRIEF AMICUS CURIAE  
IN SUPPORT OF PETITIONER

## IDENTITY OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner Robert E. Gibson. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose



of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF is submitting this brief because it believes its public policy perspective and litigation experience in the compelled dues arena (be they agency shop or state bar) will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Recently, PLF attorneys represented the petitioners in *Keller v. State Bar of California*, 495 U.S. \_\_\_, 110 L. Ed. 2d 1 (1990) (limiting the integrated bar's ability to spend objecting member's dues for political activities). Additionally PLF attorneys represented the petitioner in *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575 (1989) (limiting the use of an objecting nonmember's fee to those activities statutorily authorized in California's Educational Employment Relations Act). PLF believes the Eleventh Circuit court's opinion incorrectly analyzed the holdings of this Court which protect an individual's freedom of association and anonymity, resulting in objectors to the bar's political and ideological expenditures being forced to choose between their First Amendment right to object to nonchargeable expenditures by the bar and their First Amendment right to remain anonymous in their associations and political beliefs.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Gibson v. Florida Bar*, 906 F.2d 624 (11th Cir. 1990). The court held, *inter alia*, that the Florida Bar was not required to provide advance notice or reduction of dues for the proportion of dues that the bar knew would be used for political or ideological activities; that objecting members of the bar could be required to object on a particularized basis to each legislative policy with which they disagree; and that petitioner Gibson was not entitled to a refund of improperly collected dues.

---

## REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1 lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort, as to call for an exercise of this Court's power of supervision. Rule 10.1(c) includes as a ground for review when a state court or United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. All three of these grounds for review are present in this case.

**THE DECISION IS IN CONFLICT  
WITH THE DECISIONS OF OTHER  
UNITED STATES COURTS OF APPEALS**

The Eleventh Circuit Court of Appeals decision is flawed in many respects, but the most egregious defect is that the court held as constitutional the Florida Bar's procedure which required members to object to each particular legislative policy with which they disagree. The particularized objection procedure violates the objector's freedom of anonymous association by forcing the objector to announce beliefs unpopular with the leadership of the bar. Here, then, the price of exercising one's First Amendment right to object to expenditures of compelled dues for political or ideological activities is the relinquishing of one's First Amendment right to remain anonymous in one's beliefs.

Virtually every Circuit Court of Appeals has expressly followed the Supreme Court's holdings in *National Association for the Advancement of Colored People v. Alabama* (N.A.A.C.P.), 357 U.S. 449 (1958), and *Bates v. Little Rock*, 361 U.S. 516 (1960). These cases firmly espoused the principle that the right to refrain from disclosing one's beliefs or membership in an organization is a necessary and fundamental corollary to the freedom of association. This Court in *N.A.A.C.P.* stated that

"on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these

circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *N.A.A.C.P.*, 357 U.S. at 462-63.

Furthermore, in *Bates*, this Court elaborated on the freedoms at stake:

"Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.

"Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. 'It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a



group espouses dissident beliefs.' " *Bates*, 360 U.S. at 522-23 (quoting *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. at 462) (emphasis added; citations omitted).

Beginning with *N.A.A.C.P.*, this Court recognized the importance of protecting anonymous political activity and has repeatedly reaffirmed that the Constitution protects against compelled disclosure of political associations and beliefs. See *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 437 (1963) (state had no compelling interest in regulating the legal profession as would justify a statutory effort to obtain information to aid the enforcement of certain regulations) and *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (statute held unconstitutional which undertook to compel every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing any organizations to which he or she might belong).

Because "compelled disclosure of affiliation with groups engaged in advocacy" may infringe First Amendment rights, *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), disclosure laws that significantly encroach First Amendment rights must survive exacting scrutiny, and the state must establish a relevant correlation or substantial relation between the governmental interest and the information sought through disclosure. *Id.* at 64-65. Strict scrutiny is required even if the infringement on First Amendment rights arises "not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

This Court, while recognizing the careful scrutiny and balancing of constitutional rights that must inhere in every First Amendment case, has taken a very practical approach to analyzing the "chill" factor resulting from public disclosure of individuals' private beliefs and associations. A factual record of past harassment is not the only situation in which courts have upheld a First Amendment right of nondisclosure. The underlying inquiry must be whether a compelling governmental interest justifies governmental action that has "the practical effect 'of discouraging' the exercise of constitutionally protected political rights," *N.A.A.C.P.*, 357 U.S. at 461. This practical effect may take the form of "an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley v. Valeo*, 424 U.S. at 65. Thus, in *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968), although there was no evidence of past reprisals against contributors to the petitioner Republican Party of Arkansas, this Court held that it would be naive not to recognize that disclosure would impermissibly discourage the exercise of constitutional rights given the unpopularity of the Republican Party at that time.

In *Shelton v. Tucker*, 364 U.S. at 486, this Court struck down a state law requiring Arkansas teachers to disclose all organizations to which they belonged. As in *Pollard*, this Court took a commonsense approach and recognized that a chilling effect was inevitable if teachers who served at the absolute will of school boards had to disclose to the government all organizations to which they belonged. "[T]he pressure upon a teacher to avoid any ties which



might displease those who control his professional destiny would be constant and heavy." *Id.*

Similarly, in this case, each member of the bar is *required* to belong to that organization, and the leadership of the bar has the capability of greatly affecting a member's career and livelihood. A member may have valid reasons for not wanting the bar to know that he opposes their policies. Yet under the Florida Bar procedures, such a member must either publicly declare his dissent to each particular policy he opposes or surrender his First Amendment right not to support views he does not share.

The Circuit Courts are bound to follow these Supreme Court opinions, and by and large, they have done so. The Eleventh Circuit *Gibson* decision directly contravenes the overwhelming case law from the Supreme Court, the other circuit courts, and, in fact, its own precedential Eleventh Circuit rulings. As an example of the Eleventh Circuit's disregard of its own precedents, in *In re Grand Jury Proceeding*, 842 F.2d 1229, 1235 (11th Cir. 1988), the court analyzed *N.A.A.C.P.* in the context of quashing an order demanding membership lists of the National Commodity and Barter Association (NCBA), noting that "[g]overnmental regulation of the unprotected activities of these groups may well impinge on the protected activities. Revealing the names of the persons who participated in NCBA's commercial activities, for example, could also reveal the names of adherents to NCBA's ideology." The court then upheld the First Amendment rights of NCBA members.

The Sixth Circuit addressed the *N.A.A.C.P.* line of cases in *Marshall v. Bramer*, 828 F.2d 355 (6th Cir. 1987).

That case, in which the plaintiff sought to protect the membership list of the local Ku Klux Klan, followed the rules of those cases, and noted strict scrutiny applies:

"[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a *substantial relation between the information sought and a subject of overriding and compelling state interest*. Absent such a relation between the NAACP and conduct in which the State may have a compelling regulatory concern, the Committee has not "demonstrated so cogent an interest in obtaining and making public" the membership information sought to be obtained as to "justify the substantial abridgment of associational freedom which such disclosures will effect." ' " *Id.* at 359 (emphasis in original) (citing *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963)).

Protection of the freedom of anonymous association is necessary to preserve individual liberties, to increase the dissemination of diverse viewpoints, and to promote the structural goal of wide political participation. As the Ninth Circuit observed:

"The right of those expressing political, religious, social or economic views to maintain their anonymity is historic, fundamental, and all too often necessary. The advocacy of unpopular causes may lead to reprisals—not only by government, but by employers, colleagues, or society in general. While many who express their views may be willing to accept these consequences, others not so brave or not so free to do so will be discouraged from engaging in public advocacy." *Rosen v. Port of Portland*, 641 F.2d 1243, 1251 (9th Cir. 1981).

In *Rosen*, an ordinance requiring disclosure of members of a group desiring to distribute literature in a public forum was struck down as violative of the freedom of association and the correlative right to anonymity. The Circuit Court maintained that because the "expression of dissident or 'unsettling' views, by its very nature, invites retaliation and oppression, the identification requirement of the ordinance presents substantial dangers of 'chill and harassment.'" *Id.*

The Ninth Circuit demonstrated the continuing vitality of the freedom of anonymous association rights six years later in *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), in which the court recognized that compelled disclosure of members' names would restrict the members' right to associate freely and thus to engage in the expressive activities protected by the First Amendment. The court followed *N.A.A.C.P.* in holding that because of " 'the vital relationship between freedom to associate and privacy in one's association,' " the members were entitled to opt for anonymity. *Id.* at 1496.

The Tenth Circuit has also upheld the rights of individuals to keep their associations and beliefs private. The court held that " '[o]ffensive to the sensibilities of private citizens, identification requirements . . . even in their least intrusive form, must discourage . . . participation [in the preservation and strength of the democratic ideal].' " *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987) (citation omitted). The Tenth Circuit also accepted the petitioners' argument in *In re First National Bank, Englewood, Colorado*, 701 F.2d 115, 117 (10th Cir. 1983), holding that the compelled disclosure of membership identities, which would be the inevitable result of unsealing the records

and transferring them to the grand jury, would chill the rights of the organization members to freedom of association guaranteed by the First Amendment.

The Fifth Circuit has emphasized that individuals with freedom of anonymous association claims need not prove past harassment to succeed on their claim. In *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), the ordinance at issue was declared unconstitutional even though it did not deter speech and association so much by the exposure of individuals' beliefs to public observation, as by the threat of exposure to public opprobrium and recrimination. *Familias Unidas*, 619 F.2d at 402. "The public opprobrium, reprisals, and threats of reprisals that attend the airing of one's affiliation with an unpopular cause . . . are substantial disincentives to engaging in such affiliations." *Familias Unidas v. Briscoe*, 619 F.2d at 399. Disclosure in that case, as in this one, occurred only after members of the organization differentiated themselves as supporters of particular conduct.

The D.C. Circuit addressed the practical nature of the court's review of the chilling effect:

"In seeking to identify the chilling effect of a statute our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation." *Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission*, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

In *Community-Service Broadcasting*, the court could not specify with any degree of certainty the precise quantity



of chill which is or will be produced by the statute at issue in that case. The court said:

"Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. . . . The absence of . . . concrete evidence [of harassment] does not mandate dismissal of the claim out of hand; rather, it is the task of the court to evaluate the likelihood of any chilling effect, and to determine whether the risk involved is justified in light of the purposes served by the statute." 593 F.2d at 1118.

The Second Circuit followed the lead of the D.C. Circuit, holding that "[w]hether that chilling effect is an unconstitutional impairment of non-disclosure rights depends on an assessment of the weight of the asserted governmental interest and the degree of impairment of protected rights." *Local 1814, International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, 667 F.2d 267, 272 (2d Cir. 1981). In that case, the court emphasized that "it is appropriate in determining whether the governmental interest justifies the inevitable chilling effect of some disclosures to assess whether the disclosures will impact a group properly limited in number in light of the governmental objective to be achieved." *Id.* at 273.

Here, the Eleventh Circuit has totally disregarded the adverse effect resulting to objecting members from particularized objection. Because they fear reprisals, members will not be inclined to exercise their First Amendment

right to object to the bar's political expenditures. Furthermore, because such a minor amount of money is attached to each particular piece of legislation, the average member will likely find particularized objections too burdensome. Those members with very strong political beliefs will not necessarily be deterred by the burden of objecting, but they then run the risk of retaliation from the bar for their unorthodox views.

In *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), the First Circuit held that the "primary feature of a constitutional system is that dissenters be able to trigger refunds by means of general objections so that they need not make public their views on specific issues." *Id.* at 635. The Eleventh Circuit summarily disposed of this issue without analysis, accepting the Florida Bar's absurd argument that registering dissent does not reveal one's position. *Gibson*, 906 F.2d at 632. This Court specifically held otherwise in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In striking down the Puerto Rico Bar's particularized objection procedure, the *Schneider* court relied on *Abood*, in which this Court stated that a dissenter must not be required to make particularized objections because this "would confront an individual . . . with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." *Abood*, 431 U.S. at 241; *Schneider*, 917 F.2d at 627.

The law on the burden of proof issue, which relates to the particularized objection issue, clearly amasses in *Gibson's* favor. The nonmembers' complaint in *Brotherhood of Railway and Steamship Clerks, Freight Handlers,*



*Express and Station Employees v. Allen*, 373 U.S. 113 (1963), alleged that sums exacted by the union " 'have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs.' " This allegation was held sufficient to state a cause of action. *Allen*, 373 U.S. at 118. It would be impracticable to require objectors to allege and prove each distinct political expenditure to which they object; it is enough to manifest opposition to *any* political expenditures by the union. *Id.*

## II

### THE DECISION IS IN CONFLICT WITH THE DECISIONS OF CERTAIN STATE SUPREME COURTS

Virginia's highest court addressed freedom of association in *N.A.A.C.P. Legal Defense and Educational Fund, Inc. v. Committee on Offenses Against the Administration of Justice*, 204 Va. 693 (1963). In that case, plaintiffs sought to quash a discovery order that would require production of membership lists. The court noted that there

"is ample uncontroverted testimony in the record . . . to show that many persons fear a disclosure of their names as associates or supporters of appellants' activities will bring upon them harassment, intimidation, enmity and social and economic reprisal. This is evidenced by anonymous contributions made to avoid the threatened hostility of other persons in their community. . . . One would have to be deeply insensible to the affairs of present day life, or a modern Rip Van Winkle, to fail to observe the

opposition . . . to the activities of the NAACP and its affiliates." *Id.* at 697-98.

The court held that disclosure of the names of N.A.A.C.P. supporters violated the freedom of association, *id.* at 698, concluding that while the state may conduct legislative investigations to protect its legitimate interests, Virginia exceeded its power by intruding into an area of constitutionally protected right of freedom and privacy of association. The state was held to have failed to show such an overriding and compelling state interest as to justify substantial abridgment of associational freedoms, which disclosure of names of donors to appellants' activities would effect. *Id.* at 702.

In *Britt v. Superior Court*, 20 Cal. 3d 844 (1978), the California Supreme Court addressed the issue of whether one must espouse an *unpopular* cause to be protected by the First Amendment freedom of association. The answer is no. Constitutional protection is afforded to the privacy interests of members of *all* politically oriented associations. *Id.* at 854.

In that case, the defendant port district did not contest the constitutionally sanctioned nature of such associational activities, but instead argued initially that because the discovery order at issue does not prohibit the exercise of any such activities but merely requires their disclosure, the order is not vulnerable to constitutional attack. The California Supreme Court rejected that argument, reiterating the Supreme Court mandate that freedom of association is protected " 'not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' " *Id.* at 852 (quoting *Bates v. Little Rock*, 361 U.S. at 523). The court noted that

even adherence to a cause that finds general support could nonetheless "raise the ire of municipal authorities or other individuals or business entities" who have interests contrary to the position espoused. *Britt*, 20 Cal. 3d at 854.

One of the principal purposes of the constitutional protection of anonymous association is to free an individual to follow his conscience by ensuring that he need not "avoid any ties [simply because they] might displease those who control his [personal or] professional destiny . . . ." *Id.* at 854-55. The source of the constitutional protection of associational privacy is the recognition that, as a practical matter, compelled disclosure will often deter such constitutionally protected activities as potently as direct prohibition. *Id.* at 857.

The decision of the Eleventh Circuit Court of Appeals stands in direct conflict with those decisions and this Court should grant review to resolve that conflict.

### III

#### THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. At a minimum, the outcome of this case impacts on the entire mandatory membership of the State Bar of Florida. Further, the outcome will impact the many other states that have chosen to regulate the legal profession through an integrated bar association.

Anonymity is essential to uninhibited political activity in a democratic society. Confidentiality prevents the fear of reprisal that threatens to suppress the vigorous interchange of ideas at the core of the First Amendment's guarantee of free speech and association. American society is based on special indulgence to nurture the free expression of minority views. Because mere identification with certain disfavored ideologies can result in harassment which may silence those voices, the Constitution protects private support of political associations. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 417 (2d Cir. 1982).

The power of a government to repress dissent is substantial and can be exercised in myriad subtle ways. Anonymity is an essential element of freedom of association and the ability to express dissent effectively. As a result, removing the cloak of anonymity from those who object to the political and ideological stands taken by the Florida Bar threatens important First Amendment values. Such forced disclosure could likely lead to repercussions which consequently instill in the public the fear of becoming linked with the unpopular or the unorthodox, and of suffering socially or economically because of that linkage.

This Court in *Hudson* described one remedial means to protect objectors' constitutional rights. The *Hudson* procedures are to be construed as the *minimum* requirements. *Hudson*, 475 U.S. at 310. Through *Hudson* and *Keller*, unions and integrated bars were encouraged to experiment with procedures to achieve the least infringement on objectors' constitutional rights while still allowing the organization access to funds to which it is



entitled. New procedures have been implemented by organizations all over the country since the *Hudson* decision, and met in the courts with varying success. The procedure at issue does not meet the minimum requirements of *Hudson*, nor does it attain the substantive goals set forth in *Keller*. The procedural deficiencies are such that objectors to the Florida Bar's political and ideological expenditures cannot protect their First Amendment rights. The bar does not permit advance reduction of dues, does not provide precollection notice of the amount of nonchargeable dues, and requires issue-by-issue objections over the course of the year. The bar's procedure is not only cumbersome, but designed to discourage all but the most zealous objector.

Perhaps the most significant indicator of the importance of the issues presented in this case is the fact that this Court has, on a prior occasion, indicated a desire to review these legal questions. In *Keller*, the Court stated that the factual record was not adequately developed to determine the appropriate remedy for violation of First Amendment rights by improper expenditure of compelled dues, and thus the issue has been left undecided to this day. Here, the factual record is sufficiently developed to allow the Court to rule on this issue.

The rulings in *Hudson* and *Keller* indicate that this Court believes the issue presented here to be important enough to justify a grant of review. Both cases acknowledge that the issue of whether advance notice and reduction of dues and general objections as opposed to specific objections are constitutionally required has yet to be decided. This case presents the Court with the opportunity to make such a decision. Thus, the Court should

grant review to settle an important question of federal constitutional law impacting a significant segment of the population.

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## CONCLUSION

The conflict presented by the decision of the Eleventh Circuit Court of Appeals is clear and unmistakable. The Eleventh Circuit has rejected the decisions of at least eight other United States Circuit Court of Appeals and two state Supreme Courts.

This Court has denied certiorari in a number of recent agency fee, *Hudson* follow-up cases. *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988) (holding Wisconsin's integrated bar does not violate First Amendment rights of association and speech); *Lowary v Lexington Local Board of Education*, 903 F.2d 422 (6th Cir.), cert. denied, 498 U.S. \_\_\_, 112 L. Ed. 2d 396 (1990), *Gwartz v. Ohio Education Association*, 887 F.2d 678 (6th Cir. 1989), cert. denied, 494 U.S. \_\_\_, 108 L. Ed. 2d 941 (1990), *Gilpin v. American Federation of State, County, and Municipal Employees, AFL-CIO*, 875 F.2d 1310 (7th Cir.), cert. denied, 493 U.S. \_\_\_, 107 L. Ed. 2d 258 (1989). In the instant case, this Court will find a fully developed record of procedures alleged to comply with the *Hudson* requirements. The result of a decision on the merits of this case will have far-reaching consequences. *Lathrop v. Donahue*, 367 U.S. 820 (1961), was the only Supreme Court case addressing the integrated bar area until *Keller v. State Bar* last term. *Keller* specifically left open the question of the proper procedures necessary to protect constitutional



rights. The facts here present an excellent opportunity for the Court to finish the analysis begun in *Keller*.

Review by this Court is necessary to resolve the conflict created by the Eleventh Circuit Court of Appeals' decision in this case. Review is also necessary so that this Court can finally resolve the important question of law left unanswered in *Keller*. Amicus Curiae respectfully urges this Court to grant the petition for writ of certiorari and reverse the judgment of the Eleventh Circuit Court of Appeals.

DATED: February, 1991.

Respectfully submitted,

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(5)  
No. 90-1102

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1990

Robert E. Gibson,  
Petitioner,

v.

The Florida Bar, et al.,  
Respondents.

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Brief of Amicus Curiae  
In Support of  
Petition For Writ of Certiorari  
To The United States Court of Appeals  
For The Eleventh Circuit

*Joseph W. Little*  
Joseph W. Little  
Amicus Curiae  
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1/20/91

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No. 90-1102

IN THE  
SUPREME COURT OF THE UNITED STATES  
January Term, 1991


ROBERT E. GIBSON,  
Petitioner.

v.

THE FLORIDA BAR, et al.,  
Respondents.

Consent to File  
Amicus Curiae Brief

Consent is hereby given to the filing of an  
amicus curiae brief in support of the petition  
for certiorari by Joseph W. Little.

by , date 2/2/91  
for Robert E. Gibson,  
Petitioner

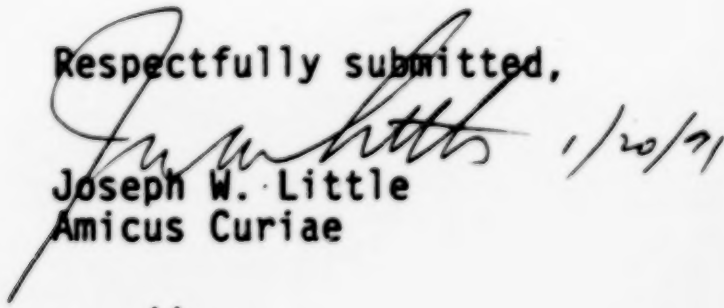
by \_\_\_\_\_, date \_\_\_\_\_  
for The Florida Bar, et al.,  
Respondents.

MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF

Pursuant to Rule 37.2, Amicus Curiae moves for leave to file this brief, and states:

1. Petitioner Gibson has consented and the written consent is included with the brief.
2. Respondent The Florida Bar has declined to consent and has authorized Amicus Curiae to represent to the Court that the reason is that Respondent has already filed its response brief. Amicus Curiae does not object to the Court's granting leave to Respondent to file a supplemental response to this brief.

Respectfully submitted,

 1/20/71  
Joseph W. Little  
Amicus Curiae



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## INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae is submitted pursuant to Rule 37 in the format denoted by Rule 37.6. It is accompanied by written consent to the filing of the brief provided by Petitioner, and, because Respondents have not consented, by a motion for leave to file.

Amicus Curiae is a member of the Florida Bar and is governed by the rules of the Supreme Court of Florida that are challenged by the petition. Amicus Curiae firmly believes that the individual constitutional rights of no American can be safeguarded if officials exercising the power of the state are permitted to limit, as a condition of their being permitted to earn a livelihood in the practice of law, the first amendment rights of persons who choose to be lawyers. Toward this

end, Amicus Curiae was an amicus participant in proceedings below in the Eleventh Circuit Court of Appeals, was an amicus participant in this Court's consideration of Keller v. State Bar of California, 110 S.Ct. 2228 (1990), is a petitioner in a related case in the Florida Supreme Court (The Florida Bar, In re: David P. Frankel, Case No. 76,853) and a respondent in another related case in the Florida Supreme Court (The Florida Bar Re Petition to Amend The Florida Bar - Bylaws 2-3.10 and 2-9.3, Case No. \_\_-\_\_\_\_.)



## SUMMARY OF ARGUMENT

Amicus Curiae agrees that the decision below is in error in approving a procedure that violates first amendment rights of Petitioner and Amicus Curiae in that the approved procedure fails to satisfy the minimum requirements of Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) in four respects:

1. It does not permit dissenters to deduct in advance that portion of the dues that fund the BAR's ideological legislative lobbying activities, but instead employs a constitutionally defective rebate system.

2. It does not permit dissenters to object generally to all the BAR's ideologically lobbying activities, but instead

unconstitutionally requires dissenting members to identify in writing each specific position they dissent to.

3. It does not require the BAR to make a detailed identification of the expenditures it can compel all members to support financially, but instead unconstitutionally requires dissenting members to identify specific positions they object to.

4. It does not provide a reasonably prompt and impartial process to decide the validity of objections of dissenters, but instead imposes an unconstitutional costly and cumbersome process.

In addition, Amicus Curiae asserts that the actual practices of The Florida Bar do in fact continue to violate the First Amendment rights of Petitioner and Amicus Curiae as those rights were acknowledged by this Court in last

term's decision in Keller v. State Bar of California, 110 S.Ct. 2228 (1990). In short, Amicus asserts that the current practices of the Bar constitute compelled funding, without proper relief, of activities that are not "'germane' to the purpose for which compelled association was justified [i.e.] the State's interest in regulating the legal profession and improving the quality of legal services." 110 S.Ct. at 2236. Specific examples are given in the argument.



## ARGUMENT

First, Amicus Curiae supports the petition for writ of certiorari on the grounds stated by Petitioner Gibson.

Specifically, Amicus Curiae asserts that the decision below does not prevent infringement of first amendment rights of members of The Florida Bar who are required to provide financial support for ideological political lobbying activities of The Bar to which they dissent. Specifically, the decision below approves a rule that is unconstitutional in several respects. It does not require The Bar to provide "an advance deduction for the proportion of dues that The Bar knows will be used for political activity," Gibson v. The Florida Bar, 906 F.2d 624, 631, 632 (11th Cir. 1990). It forces a Bar member to make his

objections to the political activities of The Bar on an issue by issue basis. Id., at 132. And, it imposes a burdensome arbitration process upon a dissenting Bar member as the means for seeking restitution of improperly imposed mandatory dues. Id. In short, the rules approved by the decision below fail to satisfy the minimum requirements of Aboud and Hudson in four respects.

1. It does not permit dissenters to deduct in advance that portion of the dues that fund the BAR's ideological legislative lobbying activities, but instead employs a constitutionally defective rebate system.

2. It does not permit dissenters to object generally to all the BAR's ideologically lobbying activities, but instead unconstitutionally requires dissenting members to identify in writing each specific position

they dissent to.

3. It does not require the BAR to make a detailed identification of the expenditures it can compel all members to support financially, but instead unconstitutionally requires dissenting members to identify specific positions they object to.

4. It does not provide a reasonably prompt and impartial process to decide the validity of objections of dissenters, but instead imposes an unconstitutional costly and cumbersome process.

Second, Amicus Curiae supports the petition on the additional grounds that the current practices of The Bar continue to violate the First Amendment rights of the Petitioner and Amicus Curiae as acknowledged by this Court in Keller. In dealing with the question of how far an integrated Bar may go in compelling

lawyers to become members of and provide financial support to an integrated bar, this Court stated:

Abood held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

\*\*\*\*\*

Precisely where the line falls between those State Bar activities in which the officials and members of the



Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

110 S.Ct. at 2236, 2237, (e.s.).

Although this Court in Keller did not make a definite statement as to their propriety, the Court nevertheless suggested that the following California Bar activities disputed

by the Keller complainants were beyond the pale imposed by Keller on Bar lobbying activities:

...lobbying for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor-piercing handgun ammunition; (3) creating an unlimited right of action to sue anybody causing air pollution; and (4) requesting Congress to refrain from enacting a guest worker program or from permitting the transportation of workers from other countries. [Also, disputed were actions of the Bar funded and sponsored Conference of Delegates that] endorsed a gun control initiative, disapproved statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endorsed a nuclear weapons freeze initiative, and opposed federal legislation limiting federal court jurisdiction over abortions, public school prayer and busing.

Despite these limits imposed and implied by Keller, The Florida Bar continues, without providing the provisions to protect dissenters prescribed by Abood, Hudson and Keller, to engage in a very broad spectrum of lobbying activities that far transcend the core functions of the integrated bar in Florida. Specifically, inter alia, the Bar has announced its intention to lobby the Florida legislature for or against the following positions:

- (a) Expansion of the women, infant and children (WIC) program.
- (b) Extension of Medicaid coverage for pregnant women.
- (c) Full immunization of children.
- (d) Establishing children's services councils.
- (e) Family life and sex education/teen

pregnancy prevention.

- (f) Increasing Aid to Families with Dependent Children.
- (g) Enhanced child-care funding and standards.
- (h) Creation of children's needs consensus estimating conference.

The Florida Bar News, Oct. 15, 1990, at 4, col. 2. Furthermore, in response to complaints raised by dissenting members of the Bar, The Florida Bar has advanced the proposition that it may, consistent with the holdings of Keller, Abood, and Hudson, take the foregoing positions even though the relief mechanisms available to dissenters are only those complained about by Petitioner Gibson in these proceedings. In short, Respondent, The Florida Bar, knowingly and willfully continues to engage in lobbying activities that violate

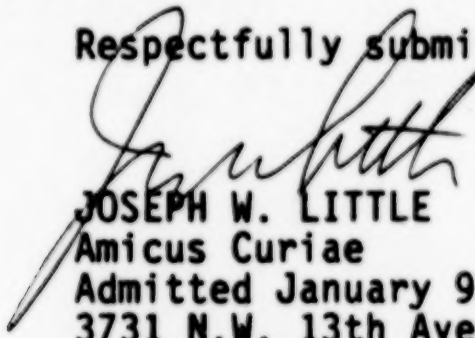


the First Amendment rights of dissenters and evidences the intention to continue to do so unless and until this Court issues an order that applies specifically to it.

**CONCLUSION**

In sum, for these additional reasons, Amicus Curiae respectfully urges this Court to grant the petition and the relief sought.

Respectfully submitted,

 1/20/91  
JOSEPH W. LITTLE

Amicus Curiae

Admitted January 9, 1979

3731 N.W. 13th Avenue

Gainesville, FL 32605

904-392-2211

CERTIFICATE OF SERVICE

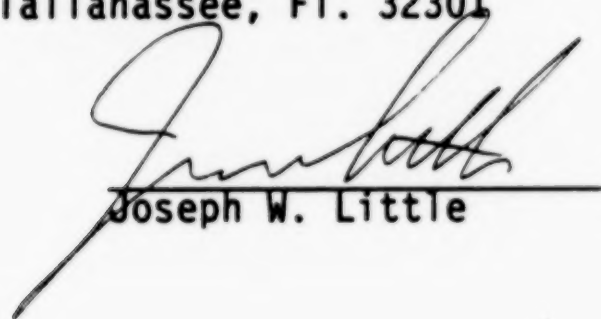
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\_\_\_\_\_  
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(7)  
No. 90-1102

Supreme Court U.S.  
FILED

MAY 1 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 10, 1991  
CERTIORARI GRANTED MARCH 18, 1991

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RELEVANT DOCKET ENTRIES

In the United States District Court for the Northern District of  
Florida, Case No. TCA 84-7109

Date	Docket No.	Proceedings
3/27/1984	2	COMPLAINT for declative and inj. relief.
4/12/1984	6	ANSWER by defdts.
8/3/1984	13	MOTION for Leave to Amend.
8/17/1984	17	PRETRIAL STIP
8/27/1984	19	ORDER (mmp) Motion for Leave to Amen-GRANTED
11/2/1984	26	MINUTES of Non-Jury Trial
11/2/1984	27	LIST Exhibit, from NJ trial 11/2/84
8/12/1985	30	FF&CL and FINAL DECLAR- ATORY JUDGMENT (MMP) 1. Request for Injunctive Re- lief is DENIED. 2. The fore- going is issued as a Final De- claratory Judgment. 3. Costs awarded to defdt upon proper motion.
9/5/1985	31	NOTICE OF APPEAL filed by pltf.
12/6/1985	36	TRANSCRIPT of non-Jury Trial held 11/2/84

Date	Docket No.	Proceedings
9/23/1986	40	EMERGENCY MOTION Pltf's, for Injunctive Relief Pending Final Hearing and for Accelerated Disposition
9/29/1986	41	RESPONSE to Pltf's Emergency Motion for Preliminary Injunction
10/10/1986	42	MANDATE (ECCA) Judgment if the District Court is REVERSED and REMANDED to the District Court.
11/19/1986	43	MOTION for Judgment on Mandate by defdts.
11/19/1986	44	MEMO in support of #43
12/4/1986	46	RESPONSE to Motion for Final Judgment
12/16/1986	47	REPLY Memo, Defdt's, on Motion for Judgment on Mandate
2/26/1987	48	NOTICE of Hearing on Motion for Judgment * * * to be held 3/12/87
3/12/1987	51	MINUTES of Hearing on Motion for Judgment. Court declines to rule, holds matter in abeyance for 70 days.

Date	Docket No.	Proceedings
3/12/1987	52	EXHIBIT LIST from above hearing. Pltf. Ex. 1 & 2 attached to list, in file
3/13/1987	53	ORDER (MMP) Defts. motion for judgment on the mandate to be held in abeyance for 70 days to allow for action by the Supreme Ct. of FL on the Bar's proposal
3/30/1987	54	TRANSCRIPT of Motion Hearing held 3/12/87
4/1/1987	55	MEMO re: Status of Amendments to Bar Policy by defdt.
4/20/1987	56	RENEWAL of Motion for Preliminary Injunction; Response to Memo Re Status of Amendments to Bar Policy by Pltf.
5/7/1987	57	ORDER (MMP) In accordance with the representations made in defdts' notice and in order to insure final action by the Florida Supreme Court, the period during which this matter will be held in abeyance is hereby extended to 9/1/87.
10/22/1987	58	RENEWAL OF MOTION for Preliminary Injunction; Motion for Final Judgment

Date	Docket No.	Proceedings
10/30/1987	59	MEMO Defdt's in Response to Pltf's Renewal of Motion for Preliminary Injunction and Motion for Final Judgment
11/5/1987	60	MEMO Regarding Renewal of Motions, Pltf's
11/10/1987	61	ORDER (MP) court will continue to hold caus in abeyance pending order of Fla. Supreme Ct.; defdts to provide Court w/ copy of Fla. Sup. Ct. order re proposed bylaws within 5 days of its issuance court withholds ruling on pltf's renewed motion for PI (#58)
6/2/1988	62	NOTICE of filing Florida Supreme Court Order
9/16/1988	64	MINUTES of status conference - counsel to prepare order for Court's signature outlining time allowable to supplement record. Court will then rule without further argument.
9/27/1988	66	NOTICE of filing affidavit of John Harkness - Ref. to MMP
4/3/1989	68	EMERGENCY MOTION for preliminary injunction by pltf.

Date	Docket No.	Proceedings
4/4/1989	69	RESPONSE defdt's, to Emergency Motion for Preliminary Injunction
5/2/1989	72	MINUTES of Motion Hearing; Oral argument heard Order to follow
5/3/1989	73	FINAL ORDER (MMP) Pltf's motion for preliminary injunction is DENIED. As no subsequent proceedings are necessary in this case, this case is hereby DISMISSED. This court reserves jurisdiction to determine any appropriate costs to be awarded.
5/4/1989	74	NOTICE OF APPEAL by pltf. - filing fee paid



RELEVANT DOCKET ENTRIES

In the United States Court of Appeals for the Eleventh Circuit,  
Case No. 89-3388

Date	Proceedings
5-10-89	Dup. Notice of Appeal and D.C. Docket Entries & Order
6-6-89	Record on Appeal — No. of Vols. 4(2P & 2T)
6-26-89	Brief for Appellant
6-26-89	Record Excerpts
7-24-89	Brief for Appellee
8-9-89	Reply Brief for Appellant
10-16-89	Case Argued
7-23-90	Opinion Rendered
7-23-90	Flg. & Entg. Judgment
8-13-90	Petition for Rehearing
10-5-90	Order Denying Rehearing
10-19-90	Jdgt. as Mdt. Issd. to Clerk

COMPLAINT  
[R. 2, filed Mar. 27, 1984]

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

ROBERT E. GIBSON,

[Clerk's filing stamp  
omitted in printing]

Plaintiff,

vs.

Case No.  
TCA 84-7109 MMP

THE FLORIDA BAR, and the  
Members of the BOARD OF  
GOVERNORS, shown by  
attachment,

Defendants.

COMPLAINT FOR DECLARATIVE AND  
INJUNCTIVE RELIEF

COUNT I

This is an action for injunctive and declaratory relief arising under the First and Fourteenth Amendments of the United States Constitution and Disciplinary Rule 7-107G of the Code of Professional Responsibility, Florida Bar Journal, September 1983, Page 99, and 42 U.S.C. 1983.

II

This Court has jurisdiction under 42 U.S.C. Section 1983 and 28 U.S.C. 1343(3).

### III

Plaintiff is a dues paying Member of The Florida Bar in good standing. Plaintiff is required by the Integration Rule of the Supreme Court of the State of Florida to pay dues to The Florida Bar as a predicate to the practice of law in the State of Florida. (Articles II and VIII of the Integration Rule.) Said Integration Rule is promulgated pursuant to the authority of the Florida State Constitution, Art. V.

### IV

Plaintiff sought to intervene as a proponent of an initiative constitutional amendment to the Florida Constitution but was denied intervenor's status and has and is participating as amicus curiae in the case of Fine v. Firestone, Case No. 64,739 now pending in the Supreme Court of the State of Florida.

### V

Plaintiff is a citizen, resident and elector of the State of Florida and a signer of the petition to place said initiative proposal on the ballot as provided by Article XI of the Florida Constitution.

### VI

Defendant, The Florida Bar, is a body created by rule of the Florida Supreme Court which is a part of the judicial branch of the State of Florida. See Preamble to Integration Rule, Florida Bar Journal, September 1983 at Page 38. The Florida Bar and its governing body, the Board of Governors, were at all times material hereto acting under color of State laws and under State law when on approximately March 19, 1984, the President of The Florida Bar, speaking for the Board of Governors through the news media announced that The Florida Bar was opposed to the enactment of the initiative constitutional proposal commonly known as Proposition 1. Further, upon information and belief, The Florida Bar has announced that it will expend funds to

provide "information packages" regarding Proposition 1 to its members.

### VII

Plaintiff and many other members of The Florida Bar in good standing support Proposition 1 and are deprived of their right of free speech under the First and Fourteenth Amendments of the United States Constitution by Defendant's actions when Plaintiff and other members of The Florida Bar who support Proposition 1 are forced to pay dues to The Florida Bar as a condition to earning a living through the practice of law and such dues are used for political purposes and promotion of ideological views adverse to theirs.

### VIII

Defendant did not poll the membership because such a poll would reveal to the public the large number of Members who support Proposition 1.

### IX

Plaintiff has no adequate remedy at law and injunctive and declaratory relief by this Court are the only methods whereby Plaintiff can avoid irreparable injury and avoid a continuation of the expression of political positions adverse to those of Plaintiff by Defendant organization which the State law requires that he be a member of and pay dues to as a condition of the practice of law.

### X

Defendant espouses and makes known its view on many political positions and actively lobbies for the same and the costs of such activities are funded by the dues which its members are required to pay, under State law.

XI

Plaintiff will clearly prevail in this suit, the United States Supreme Court having held in the case of Abood v. Detroit Board of Education, 431 U.S. 209, 52 L.Ed.2d 261, 975 at 1782, that the use of union dues, which were a mandatory condition of employment, to support ideological views was a violation of the First Amendment rights of those members who opposed such views. In Arrow v. Dow, 544 F.Supp. 458 (D.N.M. 1981) the Court found that an integrated bar identical to that of The Florida Bar should be enjoined from expressing political and ideological views to which some of its members were opposed.

XII

Abstention is not appropriate in this case as the Florida Supreme Court has previously rejected the Federal holding in the above-mentioned case and others in the case of The Florida Bar - In re Amendment to Integration Rule of The Florida Bar, 439 So.2d 213 (Fla. 1983).

COUNT II

XIII

Plaintiff incorporates paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII of Count I hereof.

XIV

Plaintiff's rights under the First and Fourteenth Amendments of association are impermissably infringed by the actions of the Defendant in that his right not to associate with those opposing Proposition 1 is denied under State law, by Defendant.

XV

The Defendant represents that its views are those of "The Florida Bar" and Plaintiff is forced by State law to be member

thereof. The public may therefore attribute falsely to Plaintiff Defendant's opinions on political and ideological matters which Plaintiff disagrees. Said conduct is in violation of Plaintiff's First and Fourteenth Amendment rights of free speech and association.

COUNT III

STATE PENDENTE CLAIM

XVI

The allegations of the preceeding paragraphs are adopted and this Court has pendant jurisdiction of these claims.

XVII

The Defendant deliberately accelerated their media released statement of opposition seven months before the election in a blatant attempt to influence its parent body, the Florida Supreme Court, which is presently considering a case in which Plaintiff is an amicus curiae and the legality of Proposition 1 is the subject matter.

XVIII

Such action by the Defendant was a violation of its own rule of professional ethics set forth in Disciplinary Rule 7-107G which prohibits the interference with the objective determination of legal matters by use of the media.

XIX

Such action by the Defendant is in violation of the Code of Judicial Conduct which has been adopted by the Florida Supreme Court. Canon 3, Section 6 of the Code of Judicial Conduct requires that Judges "abstain from public comment about a pending or impending proceeding in any Court, and should require similar abstention on the part of court personnel subject to his direction and control." Defendant, "The Florida Bar," is



such a person under the Court's control, and hence must obey the Code of Judicial Conduct.

XX

The Florida Constitution in recognition that the judicial branch is to follow the rule of law not of men gives special election status to the judiciary. The Defendant as an arm of the judiciary undertook to remove Plaintiff's opportunity for objective consideration of the case.

XXI

Plaintiff informed Bar counsel March 22, 1984 of his authorities and his intention to seek a preliminary injunction. Plaintiff has incurred the obligation to pay a reasonable attorney's fee.

WHEREFORE, Plaintiff prays as follows:

- a. That the Court hold a hearing by March 30, 1984 on a preliminary injunction and immediately thereafter issue such injunction preventing during the pendency of the cause the Defendant from further dissemination by minutes or otherwise of their views in opposition to Proposition 1.
- b. That the Court advance this matter on its docket and order a speedy hearing at the earliest practical date and cause this suit to be accelerated in every way.
- c. That this Court issue a permanent injunction restraining Defendant and their agents from expressing any view as The Florida Bar on the merits of Proposition 1.
- d. That this Court allow Plaintiff his costs herein including reasonable attorney's fees.
- e. That the Court grant all other relief to which Plaintiff appears to be entitled.

[Signature block, attached list of Board of Governors,  
& verification omitted in printing]

—○—

ANSWER

[R. 6, filed Apr. 12, 1984]

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

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Defendants answer the Complaint as follows:

1. Admitted that the Complaint alleges an action for injunctive and declaratory relief arising under the First and Fourteenth Amendments of the United States Constitution. Otherwise, denied.
2. Admitted.
3. Admitted.
4. Admitted, except that the Supreme Court of Florida rendered its Opinion in the cited case on March 27, 1984.
5. Admitted.
6. Admitted, except denied that The Florida Bar has announced that it will expend funds to provide information packages.
7. Without knowledge as to whether Plaintiff and many other members of The Florida Bar in good standing supported Proposition 1. Otherwise, denied.
8. Admitted that Defendant did not poll the membership. Otherwise, denied.



9. Denied.

10. Admitted that Defendant espouses and makes known its view on legislation determined by the Board of Governors to be related to the purposes of The Florida Bar as set forth in the Integration Rule of The Florida Bar pursuant to procedures established by the Board of Governors. Admitted that a percentage of the income of The Florida Bar comes from dues, that such money is commingled with funds received from other sources, and that a percentage of such funds is used in connection with the Defendants' positions on legislative matters as noted above. Otherwise, denied.

11. Denied that Plaintiff will prevail in this suit.

12. Admitted that abstention is not appropriate in this case.

13. Responses to paragraphs 1 through 12 are realleged.

14. Denied.

15. Admitted that Defendant represents that its view are those of The Florida Bar and admitted that Plaintiff is required by State law to be a member of The Florida Bar in order to practice law in the State of Florida. Otherwise, denied.

16. Admitted.

17. Denied.

18. Denied.

19. Denied.

20. Denied that the Defendant undertook to remove Plaintiff's opportunity for objective consideration.

21. Without knowledge as to whether Plaintiff has incurred an obligation to pay an attorneys' fee. Otherwise, admitted.

[Signature block & proof of service  
omitted in printing]

**MOTION FOR LEAVE TO AMEND COMPLAINT**  
**[R. 13, filed Aug. 3, 1984]**

**IN THE DISTRICT COURT OF THE UNITED STATES**  
**FOR THE NORTHERN DISTRICT OF FLORIDA**  
**TALLAHASSEE DIVISION**

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omitted in printing]

Comes now Plaintiff and moves to amend the Complaint in this cause so as to allege the following as the basis for jurisdiction and states that justice will best be served by permitting amendment in the following manner to broaden the jurisdictional statement.

1. This is an action for injunctive and declaratory relief and the Court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343(3) and (4), 42 U.S.C. 1983, 28 U.S.C. 2201 and the provisions of the First and Fourteenth Amendments of the U.S. Constitution.

• • • •

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omitted in printing]

**PRETRIAL STIPULATION**  
**[R. 17, filed Aug. 17, 1984]**

**IN THE UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF FLORIDA**  
**TALLAHASSEE, FLORIDA**

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omitted in printing]

**A.  
BASIS OF FEDERAL JURISDICTION**

42 U.S.C., § 1983; 28 U.S.C., § 1343; 42 U.S.C., § 1331; 28 U.S.C., § 2201.

• • • •

**F.  
ADMITTED FACTS**

Defendant admits:

1. Plaintiff is a member of The Florida Bar in good standing.
2. Some members of The Florida Bar disagree with some positions taken by the The Board of Governors of The Florida Bar on which Bar dues are used for the purpose of lobbying.

• • • •

[Signature blocks omitted in printing]

—◇—

**ORDER GRANTING LEAVE TO AMEND COMPLAINT  
[R. 19, filed Aug. 27, 1984]**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title omitted in printing]

**REFERRAL AND ORDER**

Referred to Judge Paul on 8/46/84  
Type of Motion/~~Pleading~~ Motion for Leave to Amend  
(x) Filed by Plaintiff on 8/3/84 Doc. No. 13

• • • •

[Clerk's signature omitted in printing]

\_\_\_\_\_  
\_\_\_\_\_

**ORDER OF COURT**

On the foregoing it is ORDERED this 27th day of August  
1984:

The Relief Requested is Granted  
(x) by this order.  
( ) by separate order.

/s/ Maurice M. Paul  
UNITED STATES DISTRICT JUDGE

[Clerk's record of notice to counsel  
& filing stamp omitted in printing]

—◇—

**TRANSCRIPT OF NON-JURY TRIAL  
ADMISSION OF EXHIBITS  
[Nov. 2, 1984]**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

[Title & appearances omitted in printing]

\* \* \* \*

[16] MR. MAHORN: Your Honor, we would like to move into evidence all of our exhibits. Both the exhibits for Plaintiff and the exhibits for Defendants have been stipulated to without exception.

MR. RICHARD: No objection.

THE COURT: Mark them in, please, ma'am.

(Whereupon, all stipulated exhibits for the Plaintiff and the Defendants were received into evidence.)

\* \* \* \*



EXCERPT FROM PLAINTIFF'S TRIAL EXHIBITS 6 & 7  
THE FLORIDA BAR NEWS, APR. 15, 1984, PAGE 3  
[Offered & admitted Nov. 2, 1984]

The Florida Bar News/April 15, 1984—3

## Official legislative positions of The Florida Bar

The following is the official 1984 legislative program of The Florida Bar adopted by the Board of Governors, as reported by staff Legislative Counsel Rayford H. Taylor:

### Priority Legislation

#### Support

1. The January 1984 recommendations of the Tort Litigation Review Commission, regarding changes in tort litigation law, which include:

- Repeal of Florida Statute 768.56, an act requiring an attorney's fee award to the prevailing party in a medical malpractice action.

- Section 909, Restatement of Torts, Second, be enacted as a statute governing vicarious liability for punitive damages.

- Procedural change to require a court order before a party may seek punitive damages. The complainant must make a prima facie case before he can amend his complaint for punitive damages.

- No limit should be imposed on non-economic damages in tort litigation.

- A mandatory periodic payment of judgments statute should not be adopted. The Florida Bar should continue to study the advisability of such a statute.

- Further review of Chapter 95, Florida Statutes, concerning limitation of actions, with specific attention to §95.11(4) dealing with professional malpractice.

- Present rules regarding bifurcation of trial should not be altered and should remain within the discretion of the trial judge.

- The present summary judgment process should not be altered. There should be an additional procedure established by which the party with the burden of proof as to any material issue of fact may be required to demonstrate, prior to trial, there is plausible evidence by which that burden will be carried at the time of trial.

- No ceiling or schedule should be established with regard to the contingent fees of attorneys.

- The present law with respect to expert witness testimony should not be changed.

- The current statute regarding remittitur and additur should be made applicable to all tort actions and amended to delete the requirement that any judgment must be shown to be "clearly" excessive or inadequate as a condition for the trial court to exercise the appropriate power.

- There is no need to change the current law in Florida regarding comparative negligence. Therefore, the concept of joint and several liability should be retained.

- Adoption of an offer of settlement rule or statute modeled along that presently proposed for the Federal Rules.



2. In concept, with several qualifications, the report of the Article V Review Commission recommending changes in Article V of the Florida Constitution relating to the judiciary. The Board of Governors opposed in principle, the recommendations concerning merit retention and selection of trial judges, the opening of deliberations of the judicial nominating commissions, and the modification of the Florida Supreme Court's jurisdiction by the legislature. The Bar's positions on the commission's recommendations were:

- *Recommendation 1*—Eligibility requirement for county court judges increased to provide that county judges be members of The Florida Bar for five years, and circuit court judges be members of The Florida Bar for ten years. Approved.

- *Recommendation 2*—Entire judicial system be under merit selection and merit retention process, and that the system be implemented for all trial court judges. Oppose.

- *Recommendation 3*—All vacancies for trial court judgeships be filled through the nominating commission selection process and that the Governor be allowed to start the selection process to fill the vacancies created by resignation as soon as a resignation has been accepted. Approved. It was recommended by the Board of Governors to advise the commission of a variety of problems regarding the definition of the term "vacancy."

- *Recommendation 4*—The legislature and the Supreme Court should push for dispute resolution pilot programs in (a) arbitration for appropriate civil actions, (b) mediation of domestic relation disputes, especially custody issues, and (c) pretrial diversion programs in criminal jurisdiction. Approved unanimously.

- *Recommendation 5*—Sufficient state funding should be provided to relieve local governments of appropriate portions of court funding now being financed principally by the counties. Approved unanimously.

- *Recommendation 6*—There is no justification for a return to a municipal court system; the problems can be solved within the present structure. Approved unanimously.

- *Recommendation 7*—No consolidation of the county and circuit courts into a single-tier court system. Approved unanimously.

- *Recommendation 8*—Removal of appellate district residency requirements for Supreme Court justices. No position taken.

- *Recommendation 9*—Regarding an alternative method for modification of the Supreme Court's jurisdiction by the court and the legislature. Oppose unanimously.

- *Recommendation 10*—Article V, Section 3(b)(5) be amended to allow any district court to "pass through," by certification to the Supreme Court, any "proceeding" pending before that court. Approved unanimously.

- *Recommendation 11*—Florida Rule of Appellate Procedure 9.331 should be amended by the Supreme Court to broaden the *en banc* proceedings to allow the district courts of appeal to order hearing or rehearing *en banc* to resolve questions of exceptional importance. This authority would be in addition to the present authority of the district courts to resolve conflict decisions to maintain uniformity within each district as that proscribed in Rule 9.331. Approved unanimously.

- *Recommendation 12*—Recommended legislation which would allow the district courts of appeal to review any county court decisions when certified to the district court by a county court judge. Approved.

- *Recommendation 13*—There is no need to amend the Constitution to authorize the establishment of specialized courts. Approved unanimously.

- *Recommendation 14*—Requiring uniform rules and opening up of the proceedings of the judicial nominating commissions. Oppose. However, the Bar will support PCB 38 before the House Judiciary Committee if the Bar cannot prevail on the position of leaving the JNCs as currently constituted.

- *Recommendation 15*—Recommend the constitution provide for an advisory judicial compensation commission. Approved unanimously.

- *Recommendation 16*—Elimination of all obsolete provisions in the schedule of Article V. Approved. Exception noted where elimination of obsolete provisions would be substantive law amendments.



• *Recommendation 17*—Recommend there be no change in the provision requiring retirement of active judges at age 70. Approved unanimously.

• *Recommendation 18*—No change relating to the Judicial Qualifications Commission. No position. The Board recommends further study on this issue.

• *Recommendation 19*—Recommend there be no change concerning Supreme Court supervision of Bar discipline and admissions. Approved unanimously.

• *Recommendation 20*—Recommend there be no change in the constitution concerning the office of the clerk of the circuit court. Approved unanimously.

• *Recommendation 21*—Recommend there be no constitutional change by which workers' compensation issues or deputy commissioners would be integrated into Article V. Approved unanimously.

• *Recommendation 22*—Recommend the right to counsel in civil proceedings be addressed by a more appropriate body. Approved unanimously.

• *Recommendation 23*—Recommend that Section 43.29(2) Florida Statutes (1981) be amended to provide that persons who serve on judicial nominating commissions be eligible for state judicial office when such office is filled by a nominating commission other than the one on which such person served. Adopted unanimously.

• *Recommendation 24*—Recommend no change be made with regard to the Supreme Court's rulemaking power under Article V, Section 2(a). Approved unanimously.

#### Oppose

1. Any proposal which would:

• Amend Article V of the Florida Constitution to remove the Supreme Court's authority over the admission and discipline of lawyers.

• Allow nonlawyers to serve on the Florida Supreme Court.

• Remove merit retention for appellate judges.

2. Legislation reforming the medical malpractice system consistent with proposals made by the FMA and its "Reason '83" program.

3. Legislation recreating medical malpractice review panels and establishing such panels for all other professions.

4. Legislation mandating structured payouts of all verdicts in medical malpractice cases.

5. Legislation establishing uniform circuit and county court filing fees and service charges or permitting county commissions to allocate up to 20 percent of those fees to fund a law library, legal aid program, family mediation or conciliation service or maintenance of court facilities.

6. Repeal of the current sales tax exemptions on attorneys' fees.

#### Legislation

##### Support

1. SB 28 by Senator Fox and HB 27 by Representative Simon modifying Florida's long arm statute to correct technical defects in the statute and broaden the public's access to Florida courts.

2. The judiciary getting at least the same pay increase during the biennium as that in the Governor's budget for other state workers.

3. An increase in the district court of appeals and Florida Supreme Court's filing fees from the present \$50 to an amount not to exceed \$150.

4. SB 10 by Senator Johnston to decrease the fees charged by circuit court clerks for preparing records on appeal. Prior to the 1982 session, the charge was \$1 per document. In 1982 it was changed to 50¢ per page. During the 1983 session, the Bar supported a decrease to a reasonable charge for preparing records on appeal since 50¢ a page makes the cost of preparing records too costly.

5. SB 530 by Senator Castor and HB 892 by Representative Mills and others, appointing a legislative study commission to investigate the benefits of creating a state legal services corporation funded totally by the State of Florida. In 1983, the Bar supported legislation to create the Florida Law Foundation to receive federal block grant and other monies for legal services in Florida.

6. SB 230 by Senator Childers and HB 399 by the HRS Committee reenacting the current law which requires the licensure of residential child care facilities in Florida.

7. SB 107 by Senator Dunn regarding mediation of disputes between citizens and authorizing the establishment of Citizen Dispute Settlement Centers.

8. HB 349 by Judiciary and SB 290 by Senator Castor, raising the pay of retired judges on active duty from the current \$100 per day to \$233 per day.

9. The certification by the Supreme Court of 33 additional judges in the state court system.

**Oppose**

1. Any effort to amend Article V of the Constitution which is inconsistent with those items which the Bar has established priority support for this session.

2. Legislation to amend Article V to return to the Supreme Court's jurisdiction to that of 1980.

3. Legislation to repeal the provision which prohibits justices or judges from serving after attaining the age of 70 years.

4. Legislation to amend Article V to authorize cities with populations in excess of 50,000 to establish municipal courts.

5. Legislation providing the clerk of the Florida Supreme Court, rather than the Governor, will issue warrants directing executions.

[continuation of another article  
omitted in printing]

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**PLAINTIFF'S EMERGENCY MOTION FOR  
INJUNCTIVE RELIEF PENDING FINAL  
HEARING, AND FOR ACCELERATED DISPOSITION  
[R. 40, filed Sept. 23, 1986]**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

[Title omitted in printing]

**I. MOTION:**

1. On Sept. 15, 1986, the United States Court of Appeals for the Eleventh Circuit entered an opinion and a judgment thereon, reversing this Court's final judgment. A copy of the slip opinion is attached. Although time remains for re-hearing to be requested, or for certiorari to be sought to the United States Supreme Court, at the present time it is clear that Plaintiff will prevail (and has already prevailed.)

2. For the reasons stated in the Memorandum of law set forth below, Plaintiff moves for the immediate entry of an injunction restraining the Members of the Board of Governors of the Florida Bar, ("referred to as the 'bar'") from expenditure of Plaintiff's bar dues for lobbying and other ideological activity beyond that expressly authorized by the Opinion rendered by the United States Court of Appeals for the Eleventh Circuit.

3. In addition, for the reasons stated below, Plaintiff also moves that a procedure be implemented, immediately pending final hearing, granting the procedural rights guaranteed to Plaintiff in the most recent and compelling authority on the law of compulsory use of dues for lobbying or other ideological activity, Chicago Teachers Union v. Hudson, \_\_\_ U.S. \_\_\_, 106 S. Ct. 1066 (1986) further described in the memorandum of law below.

**II. MEMORANDUM OF LAW:**

4. This case is before the Court in an unusual posture. The Court of Appeals has entered an Opinion (attached hereto) establishing that:

certain positions taken by the Bar are not sufficiently germane to its administration of justice function to justify the expenditure of mandatory dues. Gibson v. Florida Bar, No.

85-3711, Slip Op., at 5168, (11th. Cir., Sept. 15, 1986).

The Court on page 5174 of the Slip Opinion establishes the limits upon the Florida Bar's lobbying/ideological activity to "include":

- (1) Questions concerning the regulation of attorneys.
- (2) Budget appropriations for the judiciary and legal aid.
- (3) proposed changes in litigation procedures
- (4) regulation of attorney's client trust accounts and
- (5) law school and bar admission standards

The Court of Appeals also listed certain positions espoused by the Defendant, Bar, on footnote 1, page 5169. These positions do not meet the areas described in the opinion as acceptable, above. The Court of Appeals has remanded this cause to this Court to determine if the actual positions taken by the Bar are within the First Amendment limits to the Bar's right to advocate with compelled dues funding. The Bar will have the burden of proving that their expenditures are within the constitutional limits. The present status of this matter may be analogized to the entry of a final (and appealed) Summary Judgment setting forth the law and the fact of liability of the Defendant, but, leaving the issues of the extent of liability to the Defendant, remedy and ancillary matters to further consideration.

\* \* \* \*

\* \* \* Thus Plaintiff has appropriately (and with finality) established that his First Amendment rights are implicated by the Florida Bar's Legislative program and lobbying/ideological activity in general. Thus plaintiff will suffer injury which cannot be rectified by a later monetary recovery. A "rebate" of "dues" (or Bar fees) used for ideological purposes is inadequate to remedy the constitutional rights implicated. Chicago Teachers v. Hudson, \_\_\_ U.S. \_\_\_, 106 S. Ct. 1066 at 1074. \* \* \* A money judgment, although clearly required, is as a matter of law inadequate to vindicate Mr. Gibson's constitutional rights.

\* \* \* \*

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**RESPONSE TO PLAINTIFF'S EMERGENCY  
MOTION FOR PRELIMINARY INJUNCTION  
[R. 41, filed Sept. 29, 1986]**

IN THE UNITED STATES DISTRICT COURT OF THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title omitted in printing]

Defendant, The Florida Bar Board of Governors, opposes Plaintiff's emergency motion for preliminary injunction on the grounds stated below.

\* \* \* \*

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**FIRST JUDGMENT OF THE  
COURT OF APPEALS  
[Sept. 15, 1986]**

**United States Court of Appeals**

FOR THE ELEVENTH CIRCUIT

\_\_\_\_\_  
No. 85-3711  
\_\_\_\_\_



D.C. Docket No. 84-7109-11

ROBERT E. GIBSON,

Plaintiff-Appellant,

versus

THE FLORIDA BAR and Members  
of the BOARD OF GOVERNORS,

Defendants-Appellees.

-----  
Appeal from the United States District Court for the  
Northern District of Florida  
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Before HILL, Circuit Judge, HENDERSON\*, Senior Circuit  
Judge, and LYNNE\*\*, Senior District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the  
record from the United States District Court for the Northern  
District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered  
and adjudged by this Court that the judgment of the said District  
Court in this cause be and the same is hereby, REVERSED; and  
that this cause be and the same is hereby, REMANDED to said  
District Court for further proceedings in accordance with the  
opinion of this Court;

It is further ordered that defendants-appellees pay to  
plaintiff-appellant, the costs on appeal to be taxed by the Clerk  
of this Court.

\*See Rule 3(b), Rules of the U. S. Court of Appeals for the  
Eleventh Circuit.

\*\*Honorable Seybourn H. Lynne, Senior U. S. District Judge for  
the Northern District of Alabama, sitting by designation.

Entered: September 15, 1986  
For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey  
Deputy Clerk

ISSUED AS MANDATE: OCT 08 1986

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MOTION FOR JUDGMENT ON THE MANDATE  
[R. 43, filed Nov. 19, 1986]

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title & Clerk's filing stamp  
omitted in printing]

Defendants, The Florida Bar and Members of the Board of  
Governors of The Florida Bar, move for entry of a judgment on  
the mandate issued by the United States Court of Appeals for the  
Eleventh Circuit and received and filed by this Court on October  
10, 1986. As grounds therefore, Defendants state:

1. In the opinion of the Eleventh Circuit reversing the  
original judgment entered by this Court, the case was remanded  
for further proceedings.

2. After this Court rendered its judgment and before the  
Eleventh Circuit issued its opinion, the United States Supreme  
Court rendered its opinion in the case of Chicago Teachers



Union v. Hudson, 476 U.S. \_\_\_, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), in which it announced certain procedural requirements as a constitutional prerequisite to the use of compulsory union dues for lobbying activities.

3. At its meeting on November 15, 1986, the Board of Governors of The Florida Bar adopted a new procedure for the use of compulsory bar dues for lobbying activities. The procedure is set out in the affidavit of Rayford H. Taylor attached to this motion. The new procedure fully complies with the requirements announced in the opinions of the Eleventh Circuit in this action and the Supreme Court in the Chicago Teachers case.

WHEREFORE, Defendants move for a judgment finding the newly adopted procedure of The Florida Bar to be in compliance with the First Amendment rights of the Plaintiff as construed by the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit.

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**RESPONSE TO MOTION FOR FINAL JUDGMENT**  
**[R. 46, filed Dec. 4, 1986]**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title omitted in printing]

THE PLAINTIFF, ROBERT E. GIBSON, by counsel,  
respectfully represents:

• • • •

2. The BAR's position is faulty and the procedure advocated by the BAR falls far short of meeting the legal requirements set forth in Chicago Teachers Union vs. Hudson, -U.S., -106 S.Ct. 1066 (1986).

3. For the reasons set forth in the memorandum of law, this Court should enter an injunction requiring adherence to the legal requirements set forth in the Eleventh Circuit's opinion as well as that of the U.S. Supreme Court in Chicago Teachers. Plaintiff respectfully notes it has pending an Emergency Motion for interim relief.

• • • •

**8. THE SETTLEMENT PROPOSAL DOES NOT  
ADDRESS DAMAGES, COSTS AND COUNSEL FEES.**

The BAR's Motion fails to address other issues needed to be resolved on a "final judgment", (MR. GIBSON maintains that it is necessary for the Court to receive further evidence before ruling.), particularly damages for past improper uses of GIBSON's funds. In addition, MR. GIBSON is entitled to attorney's fees for the services of his counsel herein.

**9. CONCLUSION**

It is respectfully submitted that the Motion for Judgment filed by the BAR be denied.

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**LEGISLATIVE POSITIONS TAKEN  
BY THE FLORIDA BAR BOARD OF GOVERNORS  
[R. 52, filed Mar. 12, 1987]**

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE, FLORIDA**

[Title omitted in printing]

The Plaintiff, ROBERT E. GIBSON, presents a partial listing of legislative positions taken by the FLORIDA BAR, derived from The Florida Bar News, the official publications of the Bar,

1985:

February 15, 1985: "The Bar last year opposed the Florida Medical Association's Campaign to pass constitutional amendments abolishing joint and several liability." See Exhibit 1.

May 15, 1985, the Governors voted to oppose House Bill 1352 regarding medical malpractice. See Exhibit 2.

December 1, 1985, The Governors voted to support expansion of the "Florida Equal Access to Justice Act" to cover individual citizens voted to support the revision of F.S. 945.10 to allow lawyer's access to pre and post sentence investigation reports; to support a bill requiring county and municipal detention facilities to report certain incidents to the Department of Corrections and to seek a limit of 75-80 probationers per supervisor, and a funding method therefor. See Exhibit 3.

February 1, 1986, The Governors agreed on January 9 and 10 to support:

(a) a change in state law to forbid judges to override jury recommendations of mercy in capital cases (approved 21-7).

(b) a measure requiring all trial judges to be appointed (Circuit and County Judges are presently elected).

(c) increased jury compensation.

(d) drawing jurors from driver's licenses' lists (they are now drawn from voter's registrations).

(e) allowing either spouse to file for divorce in Florida if one spouse resided in Florida for six (6) months (current law now only allows the resident spouse to file).

(f) a "public guardianship" bill.

(g) lobbying for expanded recognition of unmaturred and contingent claims in probate.

(h) to allow land trusts to receive homestead exemptions.

(i) to allow unincorporated church trustees to sell land.

(j) establishing mortgages held by married couples to be held as tenants by the entireties.

(k) creating a state "division of tax policy."

(l) barring tax collectors to enforce anything except good faith payments on disputed taxes.

To oppose:

(a) a change from the "American Rule" to provide that a losing party pay the prevailing party's legal fees.

(b) "federal products liability legislation" pending in Congress. See Exhibit 4.

March 1, 1986: (Page 1). The News reports that the Florida Bar Governors oppose any change in joint and several liability. See Exhibit 5.

April 1, 1986: (Page 1). The 1986 legislative goals were stated:

- (a) "Compromise" on the Marketable Record Title Act.
- (b) Opposing a sales tax on legal fees.
- (c) Opposing any "substantial" change in the tort system.
- (d) Supporting "insurance reform."
- (e) Opposed four federal "money laundering" bills.
- (f) Continuing the state prison, "PRIDE" Industry Program.
- (g) Supporting legislation protecting "whistle blowers" in the public sector.
- (h) Approved Insurance Commissioner Guter's insurance reforms.
- (i) Approved the Alternative Dispute Resolution Committee proposal for a pilot program of alternative dispute resolution.
- (j) Opposed changes in the insanity defense.
- (k) Opposed a bill making it a "major crime" (sic) to return a child more than Twelve(12) hours late from court approved visitation.

Other positions previously set out were restated. See Exhibit 6.

June 1, 1986: Voted to allow an "Executive Committee" to take immediate action on "tort reform", and to "negotiate." See Exhibit 7.

July 1, 1986: "Espoused the position that tort reform should be linked to insurance rate rollback. See Exhibit 8.

October 1, 1986: The Board of Governors voted to oppose repeal of a sales tax exemption for attorney's fees. See Exhibit 9.

[Signature block, proof of service, &  
Exhibits omitted in printing]

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**TRANSCRIPT OF MOTION HEARING**  
**Mar. 12, 1987**  
**[R. 54, filed Mar. 30, 1987]**

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF FLORIDA**

[Title, appearances, & Clerk's filing  
stamp omitted in printing]

\* \* \* \*

[7] MR. KRAFT: GOOD AFTERNOON, YOUR HONOR.  
HERB KRAFT FROM TALLAHASSEE.

\* \* \* \*

IN THE INTERIM, MR. GIBSON'S FIRST AMEND-  
MENT RIGHTS HAVE BEEN ESTABLISHED BY THE  
DECISION, AND WHICH ARE IN THE NATURE OF AN  
IRREPARABLE HARM, ARE STILL CONTINUING TO BE  
HARMED.



I BELIEVE THAT THE ELEVENTH CIRCUIT HAS MADE IT CLEAR THAT, FIRST OF ALL, THE COURT MUST DETERMINE IF THE POSITIONS TAKEN BY THE BAR IN THE PAST, AND I BELIEVE THAT INCLUDES THROUGH TODAY'S DATE, WHETHER OR NOT THESE WERE WITHIN THE LIMITED AREA WHICH THEY DESCRIBE IN A FOOTNOTE IN THEIR [8]OPINION AS QUESTIONS CONCERNING THE REGULATION OF ATTORNEYS, BUDGET APPROPRIATIONS FROM THE JUDICIAL AND LEGAL AID, PROPOSED CHANGES IN LITIGATION PROCEDURES, CLIENTS' TRUST ACCOUNTS, REGULATION OF LAW SCHOOL AND BAR ADMISSION.

AND THEN, FROM THERE, RULE WHETHER OR NOT THOSE POSITIONS WERE WITHIN THIS; AND THEN DETERMINE IF THE PROCEDURES FOLLOW THE WORD WITHIN THE LAW.

AND AT THIS POINT, ISSUE A JUDGMENT AND DECLARATION PLAINTIFF GIBSON'S RIGHTS UNDER IT AND AN INJUNCTION TO REQUIRE THE BAR TO STOP UNTIL SOME SORT OF PROCEDURE IS ADOPTED, WHICH WILL MEET THE CONSTITUTIONAL STANDARDS WHICH WERE SET OUT BUT WERE CLARIFIED IN CHICAGO TEACHERS.

YOUR HONOR, WE HAVE PROPOSED FROM THE OFFICIAL BAR PUBLICATION, FLORIDA BAR NEWS, A RESUME OF SOME OF THE POSITIONS WHICH HAVE BEEN TAKEN BY THE BAR.

WE DON'T KNOW WHAT POSITIONS WERE TAKEN BY THE BAR, BECAUSE UP TO THIS DATE, NO COMPREHENSIVE LISTING HAS EVER BEEN SENT TO MR. GIBSON OR MEMBERS IN GENERAL.

AND IN REVIEWING WHAT I HAVE MARKED AS PLAINTIFF'S EXHIBIT 1, IN WHICH I WOULD MOVE

INTO EVIDENCE, ONE NOTES THAT THE BAR HAS STRAYED FAR AFIELD IN THE AREAS THAT WERE HELD TO BE LEGITIMATE AND APPROPRIATE.

AND THE COURT CAN, IN REVIEWING THAT, DETERMINE — AND THIS IS THE POINT IN WHICH THE BAR HAS THE BURDEN OF PROOF, THAT ALL THE POSITIONS WHICH WE HAVE LISTED IN THE EXHIBITS [9] WILL BE ON THE SCOPE OF WHAT THEY WERE ALLOWED TO USE MR. GIBSON'S DUES FOR.

IN ADDITION, IN — AGAIN, THE OFFICIAL PUBLICATION, FLORIDA BAR NEWS — THE BAR HAS STATED THE AMOUNT WHICH IS BEING SPENT AS \$10 A YEAR PER MEMBER. BUT I ALSO MOVE THAT INTO EVIDENCE.

\* \* \* \*

[11] THIS BRINGS HOW WE ARE TO FURTHER PROCEED INTO QUESTION.

THE BAR HAS THE BURDEN OF PROOF AND HAS, TO THIS POINT, DELIVERED NOTHING TO THE COURT, EITHER ON THE POSITION IT HAS TAKEN RECENTLY, NOR IN THE PAST THAT WOULD SHOW THAT THESE WERE WITHIN THE LIMITS THAT WERE PLACED IN THE ELEVENTH CIRCUIT DECISION.

THUS, I THINK THERE IS NO CHOICE BUT TO TAKE IT THAT THESE POSITIONS WILL ALL NOT BE IN THE AREA AND FASHION A REMEDY THAT WILL INCLUDE RESTITUTION OF MONEYS TAKEN FROM MR. GIBSON UNLAWFULLY IN THE PAST.

THE COURT: HOW MUCH DO YOU THINK THAT IS?



MR. KRAFT: YOUR HONOR, THE ELEVENTH CIRCUIT MENTIONED THAT THE EVIDENCE SHOWED \$1.50 HAD BEEN TAKEN PER YEAR, AND WE HAVE PRESENTED IN EXHIBIT NUMBER 2, AT THIS TIME, INDICATION FOR MR. TAYLOR, THE FORMER LEGISLATIVE COUNSEL, THAT IS NOW \$10 A YEAR. YOU THEN HAVE INTEREST UPON IT. THE PROBLEM IS NONE OF THIS RESULTS FROM AUDITED FINANCIAL STATEMENTS.

THE COURT: I AM ASKING YOU, YOU ARE HIS LAWYER, HOW MUCH DO YOU THINK HAS BEEN WITHHELD FROM MR. GIBSON? GIVE ME YOUR OPINION? ANY DATE YOU WANT TO PICK.

MR. KRAFT: GOING BACK FROM WHEN WE FILED THE SUIT, TILL TODAY, THAT WOULD BE \$23 IN INTEREST THEREON.

WE HAVE NOT GOTTEN TO THE ISSUE YET OF DAMAGES, BUT HE WOULD ALSO BE ENTITLED TO RECOMPENSE FOR THE DAMAGES THAT [12] HAVE BEEN DONE TO HIS FIRST AMENDMENT RIGHTS.

THE COURT: WHAT DO YOU THINK THAT IS?

MR. KRAFT: THAT IS A VERY DIFFICULT QUESTION TO QUANTIFY. BUT I BELIEVE THAT THE COURT COULD QUANTIFY THAT BY VIEWING THEM AS BEING IN THE NATURE OF DAMAGES THAT PLAINTIFF WOULD NORMALLY GET IN A CONVERSION SITUATION.

SECONDLY, MR. GIBSON TESTIFIED IN THE ORIGINAL CASE THAT HE HAD EXPENDED HIS OWN MONIES OF PROPOSITION ONE, TO THE EXTENT THE BAR CAME OUT AGAINST IT, THOSE EXPENDITURES WERE NEGATED.

WHENEVER YOU DEAL WITH UNLIQUIDATED DAMAGES, THERE IS CERTAINLY DISCRETION FOR THE COURT TO SET THOSE.

AND I BELIEVE THAT THE STARTING POINT, HOWEVER, IS WHAT HAS BEEN TAKEN FROM IT.

YOUR HONOR, WE SENT IN SEPTEMBER A REQUEST FOR PRELIMINARY INJUNCTION, BUT THE COURT HAS NOT RULED ON IT. AND GIVEN THAT, NOTHING HAS CHANGED. BUT THE EVIDENCE WHICH WE PRESENTED TO YOU SHOWS THAT THE BAR IS NOT FOLLOWING ITS OWN POLICY WHICH IS SUFFICIENT, AND HAS NOT PUT FORWARD A NEW POLICY WHICH IS SUFFICIENT.

I BELIEVE THAT PENDING THE COURT FASHIONING A REMEDY, THAT WE ARE ENTITLED TO PRELIMINARY INJUNCTION REQUIRING THE BAR TO CEASE LOBBYING UNTIL SUCH A TIME AS IT DOES ADOPT A CONSTITUTIONAL PROCEDURE.

\* \* \* \*

ORDER HOLDING CASE IN ABEYANCE  
[R. 53, filed Mar. 13, 1987]

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title & Clerk's filing stamp  
omitted in printing]

The cause came before the Court on March 12, 1987 for a hearing on defendants' motion for judgment on the mandate. The Court will hold this matter in abeyance for 70 days to allow

for action by the Supreme Court of Florida on the Bar's proposal.

DONE AND ORDERED this 13th day of March, 1987.

/s/ Maurice M. Paul  
United States District Judge

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**MEMORANDUM RE STATUS OF AMENDMENTS  
TO BAR POLICY  
[R. 55, filed Apr. 1, 1987]**

IN THE UNITED STATES DISTRICT COURT OF THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title omitted in printing]

At the hearing on March 12, 1987, the Court requested an estimate of the amount of time it would take for the Bar to obtain approval of the Florida Supreme Court of amended procedures under Standing Board Policy 900. The general counsel for the Bar estimated it would take 60 days and, in its order of March 13, 1987, the Court held the matter in abeyance for 70 days to allow action by the Florida Supreme Court on the Bar's proposal.

The Bar has taken the following steps since the hearing.

1. Standing Board Policy 900 was amended by the Board of Governors as attested to by the Affidavit of John F. Harkness, Jr. attached hereto as Exhibit A. The amendments are attached hereto as Exhibit B. Subsequent to the March 12 hearing it was determined that Supreme Court approval is not required for an amendment to Standing Board Policy 900. The amendment is now in effect and controls use of compulsory Bar dues for legislative purposes.

2. The Bar has also begun the process of amending its Bylaws to incorporate the new procedure. Amendments to the Bylaws do require submission to the Florida Supreme Court which has the authority to approve, modify or reject amendments pursuant to Rule 1-11.4 of the Rules Regulating The Florida Bar. A synopsis of the procedures and notice requirements for amendments to the Bylaws is attached hereto as Exhibit C. Those procedures and notice requirements are such that final approval by the Florida Supreme Court cannot take place until July 21 at the earliest or August 25 at the latest, depending upon whether or not objections are received from members of the Bar.

3. The Bar can ask the Supreme Court to adopt an expedited procedure for review of the Bylaws pursuant to Rule 1-11.4 of the Rules Regulating The Florida Bar. However, this would shorten the time provided for notice and response by members of the Bar. In light of the concern of the Plaintiffs that members of the Bar have an opportunity to be heard regarding changes in policy, and in consideration of the fact that the new procedure has already been adopted and is in force, it does not appear to be reasonable to seek an expedited procedure. Nevertheless, the Bar is prepared to do so if this Court so desires.

[Signature block, proof of service,  
& Exhibits omitted in printing]

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**RENEWAL OF MOTION FOR PRELIMINARY  
INJUNCTION; RESPONSE TO "MEMORANDUM RE  
STATUS OF AMENDMENTS TO BAR POLICY"  
[R. 56, filed Apr. 20, 1987]**

IN THE UNITED STATES DISTRICT COURT OF THE  
NORTHERN DISTRICT OF FLORIDA

[Title omitted in printing]

THE PLAINTIFF, ROBERT E. GIBSON, by counsel,  
respectfully represents:

\* \* \* \*

3. For the reasons stated in the Memorandum of Law below, this Court should enter a preliminary injunction requiring the BAR to:

(a) Implement "positive checkoff," whereby attorney's would be permitted to include above basic dues (see point "b") any amount they desire for lobbying;

(b) Provide an audited accounting, based upon the prior year, of the amount spent upon non-lobbying;

(c) Provide an impartial arbitration panel for handling disputes regarding the allocation between non-lobbying activities and lobbying activities;

(d) Place a prominent disclaimer noting that its position is only that of non-dissenting members of the BAR;

(e) Requiring adequate notice of BAR committee and executive meetings at which legislative positions may be taken.

\* \* \* \*

#### CONCLUSION

5. The BAR has refused to petition the Florida Courts as it was directly ordered to do by this Court. No further delay should be countenanced and this Court should now enter an Order giving at least interim (if not final relief) to GIBSON. There would still remain the element of damages to be resolved which will require an evidentiary hearing.

\* \* \* \*

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#### **ORDER CONTINUING STAY [R. 57, filed May 7, 1987]**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title & Clerk's filing stamp  
omitted in printing]

By order dated March 13, 1987 (doc. 53), this Court ordered that this cause be held in abeyance for 70 days to allow for action by the Supreme Court of Florida on the Bar's proposal. On April 1, 1987, defendants notified the Court of the steps taken since then (doc. 55). The Board of Governors has amended Standing Board Policy 900. The amendment is now in effect and controls use of compulsory Bar dues for legislative purposes. The Bar has also begun the process of amending its Bylaws to incorporate the new procedure. Such an amendment requires approval of the Florida Supreme Court. Defendants represent that final approval cannot take place until July 21 or August 25, depending upon whether or not objections are received. Finally, defendants note that the Florida Supreme Court could be asked to adopt an expedited procedure for review of the Bylaws, but that this would shorten the time provided for notice and response by members of the Bar, Plaintiff responded to defendants' notice by renewing his motion for preliminary injunction (doc. 56).

At the March 12, 1987 hearing, the Court declined to rule on plaintiff's motion for a preliminary injunction and ordered that these proceedings be stayed for 70 days. At this time, the Court also declines to rule on plaintiff's renewed motion. In accordance



with the representations made in defendants' notice, and in order to insure final action by the Florida Supreme Court, the period during which this matter will be held in abeyance is hereby extended to September 1, 1987.

DONE AND ORDERED this 7th day of May, 1987.

/s/ Maurice M. Paul  
United States District Judge

**RENEWAL OF MOTION FOR PRELIMINARY  
INJUNCTION; MOTION FOR FINAL JUDGMENT  
[R. 58, filed Oct. 22, 1987]**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title omitted in printing]

The Plaintiff, ROBERT E. GIBSON, by its counsel renews its previous Motions for preliminary injunctions, stating:

1. Reviewing the progress of this matter since the appeal's court rendered its decision:

- (a) Sept. 15, 1986 - Eleventh Circuit renders its opinion;
- (b) Sept. 23, 1986 - Plaintiff moves for Preliminary Relief;
- (c) Sept. 26, 1986 - Defendant replies to Motion;
- (d) Oct. 8, 1986 - Mandate issues;
- (e) Nov. 19, 1986 - Defendant moves for judgment on the mandate;
- (f) Dec. 4, 1986 - Plaintiff replies to Defendants' Motion for Judgment on the mandate;
- (g) Dec. 15, 1986 - Defendant files a further reply;
- (h) March 12, 1987 - Court holds hearing;

(i) March 13, 1987 - Court issues Order requiring the Bar to gain Supreme Court approval of its Board Policy within seventy days;

(j) April 17, 1986 - Plaintiff in response to Defendants' "Status Report" again renews its request for preliminary injunctive relief.

2. In the period of almost 14 months since the 11th Circuit ruled on this matter Plaintiff has requested preliminary relief on September 23, 1986, March 12, 1987, and April 7, 1986.

3. To date the Court has declined to rule.

4. The BAR has not met the most recent extended deadline to present for the Court's approval an Order of the Supreme Court implementing whatever relief the Bar sees fit to offer to this Court as protection of Plaintiff's rights.

5. There is no justification for further delay in ruling upon Plaintiff's Motions for Preliminary Injunction. The BAR has been given from March to September to formulate a plan, circulate it (so that the due process rights of the members of the BAR other than GIBSON are protected) for comment and to get final approval of the Florida Supreme Court. It has not been done so, and October is about to end. The BAR did not seek a further extension.

6. As GIBSON has noted in the legal memoranda, first amendment injuries are by definition irreparable. GIBSON has been suffering, and will continue to suffer damage to his rights by the continuation of unconstitutional acts by the Defendants. It is respectfully requested that GIBSON be granted both preliminary relief, and a final ruling thereafter.

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omitted in printing]



**DEFENDANTS' MEMORANDUM IN RESPONSE TO  
PLAINTIFF'S RENEWAL OF MOTION FOR  
PRELIMINARY INJUNCTION AND MOTION  
FOR FINAL JUDGMENT  
[R. 59, filed Oct. 30, 1987]**

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

[Title omitted in printing]

Defendant's, The Florida Bar and the members of the Board of Governors, respond to Plaintiff's Renewal of Motion for Preliminary Injunction and Motion for Final Judgment as follows:

On September 14, 1987, the Supreme Court of Florida heard oral argument from interested members of the Bar regarding the proposed amendment to the Bylaws of The Florida Bar. The Florida Bar is now awaiting an order from the Supreme Court in connection with the proposed Bylaws.

Pending a determination from the Florida Supreme Court on the Amendment to the Bylaws, the Bar placed into effect in March, 1987, the procedure which would be enacted by the amendment. The details of that new procedure has previously been filed with this Court. In accordance with the new procedure, legislative positions have now been published on two separate occasions. On the first series of legislative positions, 13 objections were received, of which one was withdrawn. On the second series of positions, only 7 objections were received and one of those objectors indicated that he did not desire to have any funds returned. Of the 18 objectors requesting a refund, the Bar elected to return to all of them the full pro rata amount of their dues attributable to legislative lobbying, plus interest.

The proposed amendments to the Bylaws were published in The Florida Bar News which is sent to all members of The Florida Bar. No objections were received from members of the

Bar to the proposed new procedure, with the exception of the objections by Tom Schwartz which were duly received by the Florida Supreme Court. The Plaintiff, Mr. Gibson, did not object to the proposed amendment to the Bylaws and has not objected to any legislative positions announced in the two series since the adoption of the new procedure.

Plaintiff has suggested no irreparable injury or any other ground which would justify the issuance of a preliminary injunction and it is clear from the facts cited above that no injury is being suffered by the Plaintiff or any other member of The Florida Bar during the pendency of this action.

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omitted in printing]

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**ORDER FURTHER CONTINUING STAY  
[R. 61, filed Nov. 10, 1987]**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

[Title & Clerk's filing stamp  
omitted in printing]

By order of this Court dated May 7, 1987, this case was held in abeyance until September 1, 1987 to allow for action by the Florida Supreme Court to amend the bylaws that are relevant to this cause. That date having passed with no action by the Supreme Court, plaintiff renews his motion for preliminary injunction (doc. 58).

Defendants' indicate that the Florida Supreme Court heard oral argument regarding the proposed amendment to the bylaws on September 14, 1987. The Bar is awaiting an order from the Supreme Court on the proposed bylaws. Accordingly, this Court

will continue to hold this cause in abeyance pending the order of the Florida Supreme Court. Defendants are ordered to provide this Court with a copy of the order of the Florida Supreme Court regarding the proposed bylaws within five (5) days of its issuance.

The Court WITHHOLDS RULING on plaintiff's renewed motion at this time.

DONE AND ORDERED this 10th day of November, 1987.

/s/ Maurice M. Paul  
United States District Judge



**FLORIDA SUPREME COURT ORDER**  
**[R. 62, filed June 2, 1988]**

**[526 So. 2d 688]**

[Notice attaching Order  
omitted in printing]

**THE FLORIDA BAR RE AMENDMENT**  
**TO RULE 2-9.3 (LEGISLATIVE**  
**POLICIES).**

**No. 70990.**

Supreme Court of Florida.

June 2, 1988.

PER CURIAM.

The issue in this case is whether we should permit a proposed amendment to rule 2-9.3, legislative policies, Rules Regulating the Florida Bar, to become effective. This amendment sets forth a procedure and potential remedy for bar members who question the propriety of the use of bar dues to support legislative positions approved by the bar's board of governors. The proposal was made, in part at least, as the result of litigation brought by a member of The Florida Bar against the bar, in which he claimed that monies were impermissibly spent for certain lobbying activities. *See Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir.1986).

We heartily approve rule 2-9.3(b) which requires The Florida Bar to publish legislative policies adopted by the board of governors. We construe this to mean that the membership will be advised of what legislative programs the bar will be spending money on in its lobbying activities.

Nor do we find objectionable the remainder of the amendment, with certain qualifications. The amendment seemingly limits actions against The Florida Bar for its lobbying expenditures to the remedies prescribed in the rule. Although the pecuniary recovery may be limited, members of the bar should still be able to bring injunctive actions seeking to prevent unauthorized bar activities and expenditures. The limited remedy of a partial dues refund is not adequate to bar access to the courts to challenge the appropriateness of the bar's lobbying activities. The only change we have made in the proposed amendment is to substitute "shall" for "may" in the last sentence of paragraph 2-9.3(e)(2).

With these qualifications we approve the amendment to rule 2-9.3 as attached hereto, effective immediately.

It is so ordered.

MCDONALD, C.J., and OVERTON, EHRLICH, SHAW,  
BARKETT, GRIMES and KOGAN, J.J., concur.

[Amended Rule 2-9.3 omitted in printing -  
reproduced in Petition Appendix A at 6a n.8]

—◆—

**NOTICE OF FILING AND AFFIDAVIT  
OF JOHN F. HARKNESS, JR.  
[R. 66, filed Sept. 27, 1988]**

IN THE UNITED STATE DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title omitted in printing]

Pursuant to this Court's Order on September 16, 1988, The Florida Bar files herewith an Affidavit of John F. Harkness, Jr., Executive Director of The Florida Bar, with attached compilation of legislative positions of The Florida Bar from November 2, 1984, until September 16, 1988.

The Bar reiterates its argument that the positions taken by the Bar are not relevant to this Court's determination of whether or not to approve the rules adopted by the Bar and approved by the Florida Supreme Court.

[Signature block & proof of service  
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**AFFIDAVIT**

I, JOHN F. HARKNESS, JR., as Executive Director of The Florida Bar, attest the following information is true and correct to the best of my knowledge and belief.

1. As executive director of The Florida Bar I am custodian of the official records of that organization.

2. The attached compilation of legislative positions reflects action taken by the Board of Governors or executive committee of The Florida Bar from November 2, 1984 to date, representing all official legislative positions of The Florida Bar since the trial date of Robert E. Gibson v. The Florida Bar, et al., through September 16, 1988.

[Signature block & jurat  
omitted in printing]

1985-86 Legislative Program of The Florida Bar

**PRIORITY LEGISLATION**

\*A. Support creation of a capital collateral representative office funded by the Florida legislature.

\*B. Oppose removal of the admission and discipline of attorneys from the Supreme Court of Florida.

\*C. Oppose a sales tax on attorneys' fees.

D. Oppose radical or unwarranted changes to the tort system which are inconsistent with the concept set forth in Appendix A.

\*E. Oppose deletion of the single-subject requirement for constitutional amendments proposed through the citizen initiative process.

**NONPRIORITY LEGISLATION**

A. Support enactment of judicial trust fund legislation.

\*B. Support creation of a statewide prosecution function.



\*C. Support continuation or expansion of the Legislative Law Education Mini-Grants Program (FS 233.0615). Last year the Florida legislature appropriated \$190,000 for this program.

\*D. Support expansion of the Judicial Clerkship Program under the State Court Administrator's office. Last year the legislature appropriated \$50,000. This year we are seeking an appropriation of \$100,000.

E. Support continuation of the PRIDE program for Florida's correctional facilities.

F. Support enactment of legislation creating the Office of Public Guardian, which may be established in each judicial circuit by that circuit's chief judge. This legislation was developed as a result of a compromise involving the Disability Law Committee of The Florida Bar and the Guardianship Law Committee of the Real Property, Probate and Trust Law Section of The Florida Bar.

\* Position pages are enclosed with this summary.

## APPENDIX A

The Florida Bar actively seeks solutions to the issues of tort reform which are sensitive to the diverse interests involved and with particular regard for the interests of the public. To this end, The Florida Bar states its legislative policy on these subissues.

### Abolition of Joint and Several Liability

The Florida Bar generally supports the positions contained in the Reports of the Tort Litigation Review Commission and the Gunter Commission on this issue.

### Cap or Abolition of General Damages

The Florida Bar generally supports the positions of the Tort Litigation Review Commission and Gunter Commission on this issue.

### Limit or Schedule Attorneys' Fees

The Florida Bar opposes arbitrary and unreasonable limits on, or schedules of, attorneys fees. The Florida Bar continues its support of the positions of the Tort Litigation Review Commission and Gunter Commission on this issue.

### Structured Payments

The Florida Bar opposes mandatory if applied to all cases. Structured payment verdicts are permitted under current law. Any legislation describing structured payments must protect a party's verdict and payment thereof.

### Mandatory Bifurcation of Trial

The Florida Bar opposes arbitrary and mandatory bifurcation and supports the positions of the Tort Litigation Review Commission and Gunter Commission on this issue.

### Punitive Damages

The Florida Bar continues its support of the positions of the Tort Litigation Review Commission and Gunter Commission. The Florida Bar supports requiring a prima facie showing before Plaintiff can amend complaint to plead punitive damages.

### Jury Trials

The Florida Bar supports retaining jury trials for all citizens of Florida.



FS 768.56

The Florida Bar continues to support repeal and supports the positions of the Tort Litigation Review Commission and the Gunter Commission; both recommended repeal.

1986-87 Legislative Program of The Florida Bar  
(Carry-over from Previous Session)

PRIORITY LEGISLATION

- A. Oppose removal of the admission and discipline of attorneys from the Supreme Court of Florida.
- B. Oppose a sales tax on attorneys' fees.
- C. Oppose radical or unwarranted changes to the tort system which are inconsistent with the concepts set forth in Appendix A.
- D. Oppose deletion of the single-subject requirement for constitutional amendments proposed through the citizen initiative process.

NONPRIORITY LEGISLATION

- A. Support enactment of judicial trust fund legislation.
- B. Support continuation or expansion of the Legislative Law Education Mini-Grants Program (F.S. 233.0615). Last year the Florida legislature appropriated \$199,997 for this program.
- C. Support expansion of the Judicial Clerkship Program under the State Court Administrator's office. Last year the legislature appropriated \$50,000. This year we are seeking an appropriation of \$100,000.

D. Support continuation of the PRIDE program for Florida's correctional facilities.

E. Support enactment of legislation creating the Office of Public Guardian, which may be established in each judicial circuit by that circuit's chief judge. This legislation was developed as a result of a compromise involving the Disability Law Committee of The Florida Bar and the Guardianship Law Committee of the Real Property, Probate and Trust Law Section of The Florida Bar.

- \* F. Support passage of an amendment to F.S. 57.111 (Equal Access to Justice Act) which would expand the statute to include any citizen of the State of Florida who has an action initiated against him by a state agency.
- \* G. Support passage of the Florida Law Endowment Act. This bill would create a quasi-governmental nonprofit corporation whose sole function would be to collect and distribute funds to local legal aid offices.
- \* H. Support passage of an amendment to Florida's capital crimes statute to provide that a jury's recommendation of life imprisonment would be binding upon the judge.
- \* I. Support an amendment to Article V, Section 11 of the Florida Constitution (1968) which would require all vacancies of trial court judgeships be filled through the judicial nomination commission process. All newly appointed judges will be subject to an election at the next general election after he or she has served at least one year.

FEDERAL LEGISLATION

- \* A. Support legislation to permit expended lawyer participation in the voir dire process of selecting jurors in the federal district courts.

- \* These positions were adopted by the Board between July, 1985 and January, 1986.

April 18, 1988

- 20. Mandatory IOTA--The Florida Bar opposes legislatively mandated participation in the Interest on Trust Accounts (IOTA) program.

April 20, 1988

- 21. The Florida Bar supports the following positions regarding tort law revision:

- a) Joint and Several Liability and Comparative Fault--"Pure" comparative fault should be retained as outlined in Hoffman v. Jones. The joint and several liability doctrine should be modified in accordance with the Uniform Comparative Fault Act (UCFA) principle that any uncollectible damages shall be reallocated among the other parties at fault, including a claimant at fault, according to their respective percentages of fault.
- b) Statutes of Limitations and Repose--At the present time there should be no change in existing statutes of limitations or repose.
- c) Strict Liability--As to product liability, the rule of law should be the common law, and these matters should be left to the courts to continue to strive for the proper balance on a case-by-case basis. Further, as to the Florida dog bite statute, the following changes should be enacted:
  - 1. Eliminate the provocation or aggravation defense as to any person under six years of age.
  - 2. Limit a dog owner's liability to a negligence standard if a valid "bad dog" sign has been posted.

- d) Limitations on Noneconomic Damages--No conditional or unconditional limitations should be imposed on noneconomic damages in tort cases.
- e) Periodic Payments and Structured Settlements--The \$250,000 threshold for periodic payments of future economic losses under §768.78, F. S., is an appropriate threshold amount and should not be modified by reducing the threshold to \$25,000 or to include noneconomic damages.
- f) Punitive Damages--The trial court, at the close of evidence, should determine whether a legal basis exists for the recovery of punitive damages, said determination to be made utilizing current case law. Once the court permits the issue of punitive damages to go to the jury, the jury should have discretion whether or not to award punitive damages and should determine the amount which should be awarded. To the extent that the 1986 Tort Reform and Insurance Act modifies these principles, it should be repealed.
- g) Collateral Source Rule--The collateral source offset rule should not be extended so as to eliminate subrogation.
- h) Itemization of Verdicts--No change should be made in the itemized verdict procedure concerning the award of future economic losses.
- i) Jury Instructions on Noneconomic Damages--Existing jury instructions are adequate and no further changes should be made.
- j) Limitations on Frivolous Claims and Defenses--Existing sanctions for frivolous complaints and defenses, as governed by §57.105, F.S., are sufficient, and The Florida Bar opposes adoption of provisions providing sanctions for frivolous claims and defenses similar to

those contained in Rule 11 of the Federal Rules of Civil Procedure.

- k) Limitations on Contingency Fees and Referral Fees--No change should be made in the current regulation of contingency fees as ordered by the Florida Supreme Court.
  - l) Prejudgment Interest--The Florida Bar opposes the concept of differential prejudgment interest.
  - m) Mandated Demand for Judgment--Existing law relating to offer and demand for judgment provide sufficient incentives to motivate early and thorough consideration of the strength and weakness of claims by both parties.
22. The Florida Bar supports a legislative appropriation of \$1.5 million for the benefit of the legal services corporations.

April 27, 1988

23. The Florida Bar supports authorizing a driver-data-base list to be used for the selection of jurors in conjunction with registered electors.

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**EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**  
**[R. 68, filed Apr. 3, 1989]**

UNITED STATES DISTRICT COURT,  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

[Title omitted in printing]

The Motion of Robert E. GIBSON, by counsel, respectfully represents:

\* \* \* \*

2. Gibson's position, which has been articulated on several different occasions, is that the Bar's rules and regulations regarding lobbying are fatally defective because they are only a rebate scheme. The minimum constitutional requirement for the use of compulsory dues for lobbying is that the governmental agency seeking to use such dues must in good faith estimate the amount it will use for lobbying in advance of the collection of the dues, and offer an advance reduction in that amount. Further, a review by a neutral third party is also necessary if the amount of the set aside is challenged as sufficient by any dues payor.

In the U.S. Supreme Court cases that Gibson has relied upon, the Court has noted again and again that "A pure rebate approach is inadequate." Ellis vs. Railway Clerks, 466 U.S. 435 and Chicago Teacher's v. Hudson, 106 S.Ct. 1066 (1986).

\* \* \* \*

5. By definition, injuries to first amendment rights are irreparable.

6. Yet another Florida legislative session is about to begin, and the Bar has undertaken its usual campaign—with Gibson's money—to lobby.

7. Given the clarity of the law requiring that Gibson is entitled to the relief he requests on a preliminary basis pending the final ruling of this Court, and the irreparable nature of the continuing injury which is occurring to him, it is respectfully requested that the Court advance this matter to the top of its docket and issue an immediate ruling on Gibson's preliminary injunction Motions.

[Signature block & proof of  
service omitted in printing]



**NOTICE OF APPEAL**  
**[R. 74, filed May 4, 1989]**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

[Title omitted in printing]

NOTICE IS HEREBY given that ROBERT E. GIBSON,  
Plaintiff above named, hereby appeals to the United States Court  
of Appeals for the Eleventh Circuit from the Final Judgment  
entered in this action on the 3rd day of May, 1989.

[Signature block & proof of service  
omitted in printing]

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**ADDENDUM TO ANSWER BRIEF OF APPELLEES**  
**[11th Cir., filed July 24, 1989]**

• • • •

**THE FLORIDA BAR JOURNAL/SEPTEMBER 1988 29**

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**Financial Organization**

The Florida Bar's 1988-89 operating budget is \$12.8 million. Membership dues account for only 49%, or \$5.9 million, of that amount.

The additional \$5.9 million in revenues comes from nondues sources, generated by various Bar programs and member services such as: sale of commercial ad space in *The Florida Bar Journal* and *News*, sale of public information brochures, subscription to

the *Case Summary Service*, rental of exhibit space at Bar meetings, and through Florida Supreme Court orders directing disciplined lawyers to pay prosecution costs.

A breakdown of the 1988-89 General Fund budget reflects all Bar programs costs, including support services and overhead.

Under special guidelines, the Bar's legislative program is considered to be funded entirely from member dues. The legislative budget of \$320,247 divided by the July 1, 1988 members in good standing of 42,974 give a cost per member of the legislative program of \$7.45.

The Florida Bar was the first state bar association to implement a cost allocation system for its various programs and activities with all costs other than General Administration, Board and Officer, and Planning and Evaluation being allocated to the end users based on the best available measure of usage. With a watchful eye toward expenditures and efficiency, Bar leadership and staff have implemented the system to monitor program expenses carefully. Prior to final adoption by the Board of Governors, the proposed Florida Bar operating budget is printed in *The Florida Bar News*. In addition, members are provided an opportunity to comment on the proposed budget at statewide hearings held by the Bar's Budget Committee.

An audit of all Florida Bar finances is conducted at the end of each fiscal year by an independent auditing firm, under the supervision of the Audit Committee, and a report is published in *The Florida Bar News* for members' review.

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1988-89 General Fund Budget Statistics

	Percentage of Total Budget	Percentage of Dues Support	Amount of Dues Dollar Support
Lawyer Regulation	30.7%	50.2%	\$ 70.28
UPL	1.8%	3.0%	\$ 4.20
CSF	<u>2.4%</u>	<u>4.0%</u>	<u>\$ 5.60</u>
	34.9%	57.2%	\$ 80.08
Journal & News	7.8%	0.9%	\$ 1.26
Public Information	4.8%	7.2%	\$ 10.08
Public Interest Programs	3.6%	4.9%	\$ 6.86
Meetings & Convention	4.2%	1.8%	\$ 2.52
Committees & Other Activities	5.1%	6.9%	\$ 9.66
Section Administration	4.0%	2.8%	\$ 3.92
CLE Programs	15.5%	-0-	-0-
Legal Publications	9.2%	-0-	-0-
Legislation	2.7%	4.5%	\$ 6.30
Administration	<u>8.2%</u>	<u>13.8%</u>	<u>\$ 19.32</u>
	100.0%	100.0%	\$140.00

\* \* \* \*

SECOND JUDGMENT OF THE  
COURT OF APPEALS

[July 23, 1990]

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 89-3388

TCA 84-7109-MMP

ROBERT E. GIBSON,

Plaintiff-Appellant,

versus

THE FLORIDA BAR and  
Members of the BOARD OF  
GOVERNORS,

Defendants-Appellees.

Appeal from the United States District Court for the  
Northern District of Florida

Before TJOFLAT, Chief Judge, ANDERSON and CLARK,  
Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record  
from the United States District Court for the Northern District  
of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby **AFFIRMED** in part and **REVERSED** in part;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

---

CLARK, Circuit Judge, dissented and filed an opinion.

Entered: July 23, 1990  
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland  
Deputy Clerk

ISSUED AS MANDATE: OCT 19 1990

(8)  
No. 90-1102

Supreme Court, U.S.  
FILED  
MAY 1 1991  
OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

**BRIEF FOR THE PETITIONER**

RAYMOND J. LAJEUNESSE, JR.\*  
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National Right to Work Legal  
Defense Foundation, Inc.  
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(703) 321-8510

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(904) 877-7139

ATTORNEYS FOR PETITIONER  
*\*Counsel of Record*

May 1, 1991

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## QUESTIONS PRESENTED

- I. Do the procedural safeguards mandated by the first and fourteenth amendments to the United States Constitution for the exaction of bar dues required as a condition of the practice of law include:
  - A. pre-collection reduction of an objecting attorney's dues to that amount which the state bar expects to use for purposes it can constitutionally charge to him; and,
  - B. pre-collection disclosure of the basis for the part of dues that will be used for lawfully chargeable purposes, rather than merely post-collection notice of particular political and ideological positions taken by the bar?
- II. Does a requirement that an attorney object to specific political and ideological positions when taken by the bar, rather than state one general objection to any use of his compulsory bar dues for constitutionally objectionable purposes, unduly burden the exercise of his first- and fourteenth-amendment right to challenge the amount that he must pay?
- III. Is the burden of proof under this Court's applicable decisions impermissibly shifted from the bar to the objector when an attorney is denied a refund of the part of his compulsory dues spent for constitutionally nonchargeable purposes in the past, because he did not present evidence as to that portion, even though his complaint states a valid cause of action challenging such expenditures and requests declaratory, injunctive, and "all other relief to which [he] appears to be entitled," and he repeatedly asked the district court to hold an evidentiary hearing to determine the amount of the refund due him?



## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included as respondents the Members of the Board of Governors of the Florida Bar, identified in the complaint as: Patrick G. Emmanuel, Thomas M. Ervin, Jr., David V. Kerns, Thomas W. Brown, John M. McNatt, Jr., Rutledge R. Liles, Robert E. Austin, Jr., F. Wallace Pope, Jr., Louie N. Adcock, Jr., William E. Loucks, Stephen A. Rappenecker, William Trickel, Jr., Dan H. Honeywell, Robert E. Pyle, Phyllis Shampianier, Theodore Klein, Barry R. Davidson, Stephen N. Zack, Alan T. Dimond, Robert E. Livingston, Michael Nachwalter, George A. Dietz, J. Fraser Himes, Barry A. Cohen, Rowlett W. Bryant, Joseph J. Reiter, Sidney A. Stubbs, Jr., Joe F. Miklas, Ray Ferrero, Jr., Harry G. Carratt, Drake M. Batchelder, Elting L. Storms, Ben L. Bryan, Jr., J. Dudley Goodlette, Edwin Marger, Neil J. Berman, and Edwin P. Krieger, Jr.; and in the Initial Brief of Appellant at ii in the court of appeals as: William H. Clark, Thomas M. Ervin, Jr., Crit Smith, S. Austin Peele, Joseph P. Milton, A. Hamilton Cooke, Robert E. Austin, Jr., James A. Baxter, Kenneth C. Deacon, Jr., William F. Blews, Horace Smith, Jr., Robert O. Stripling, Jr., John Edwin Fisher, Chandler R. Muller, David B. King, R. Kent Lilly, Patricia A. Seitz, Edward R. Blumberg, Sandy Karlan, Manuel A. Crespo, Michael Nachwalter, Alan T. Dimond, John W. Thornton, Jr., Robert M. Sondak, Stuart Z. Grossman, Joseph H. Serota, Daniel A. Carlton, Benjamin H. Hill III, Gary R. Trombley, Thomas M. Gonzalez, C. Douglas Brown, Patrick J. Casey, Arthur G. Wroble, H. Michael Easley, Joe F. Miklas, James Fox Miller, Roger H. Staley, Terrence Russell, Walter G. Campbell, Jr., Thomas G. Freeman, George H. Moss II, John A. Noland, William L. Guzzetti, Harry W. Dahl, Frederick J. Bosch, David W. Bianchi, Ladd H. Fassett, Wilhelmina L. Tribble, and Ruth Ann Bramson.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 90-1102

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ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the United States<sup>1</sup>  
Court of Appeals for the Eleventh Circuit**

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**OPINIONS BELOW**

The majority and dissenting opinions of the United States Court of Appeals for the Eleventh Circuit (Petition Appendix ("P.A.") 1a, 17a) are reported at 906 F.2d 624; its unreported judgment is reprinted in the Joint Appendix ("J.A.") at 63. There was no formal opinion of the United States District Court for the Northern District of Florida; its unreported final order is reproduced in the Petition Appendix at 22a.

An opinion of the court of appeals on an earlier appeal (P.A. 24a) is reported at 798 F.2d 1564. The unreported decision of the district court reversed on that appeal is reprinted in the Petition Appendix at 35a.

## JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. J.A. 64. A petition for rehearing, timely under Eleventh Circuit Rule 40-2, was denied on October 5, 1990. P.A. 43a. On November 26, 1990, Associate Justice Anthony M. Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 17, 1991. Order (U.S. No. A-386). The petition was filed on January 10, 1991, and this Court granted the writ on March 18, 1991. 59 U.S.L.W. 3503, 3635. The jurisdiction of this Court rests on 28 U.S.C.A. § 1254(1) (West Supp. 1991).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution states in pertinent part: "Congress shall make no law \* \* \* abridging the freedom of speech \* \* \* or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), says in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State \* \* \*, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Article V, § 15 of the Florida Constitution provides: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

## STATEMENT OF THE CASE

The Florida Supreme Court has dictated by rule that to practice law in Florida an individual must be a member in good standing of respondent Florida Bar ("the Bar"). The rules regulating the Bar also require that, to maintain good standing, members must pay annual dues on or before July 1 of each year. P.A. 25a; Fla. Stat. Ann., Rules Regulating Bar, Rule 1-3, -7.3 (West Supp. 1990). Petitioner Robert E. Gibson is a member in good standing of the Bar. P.A. 26a.

The purposes declared by the Florida Supreme Court for the Bar are "to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." Fla. Stat. Ann., Rules Regulating Bar, Rule 1-2 (West Supp. 1990). One program for which the Bar uses dues is the taking and advocacy of positions on political and ideological issues, including ballot questions, through lobbying, publications, and speeches by Bar officials. P.A. 25a & n.1, 36a. When the Bar announced opposition to a ballot question actively supported by Mr. Gibson that would have limited state taxes and other revenues, he brought this action under 42 U.S.C. § 1983. P.A. 26a, 35a.

The complaint alleges that the Bar's general practice of funding political advocacy with dues violates Mr. Gibson's first-amendment rights of free speech and association. P.A. 1a-2a; J.A. 9-11.<sup>1</sup> Federal jurisdiction is based on 28 U.S.C. §§ 1331 and 1343(3) (1982). P.A. 35a; J.A. 15-17. The complaint requests declaratory, injunctive and "all other relief to which Plaintiff appears to be entitled." J.A. 7, 9, 12.

At a bench trial, Mr. Gibson proved that, in addition to opposing the tax-limitation measure that precipitated his suit, the Bar had, *inter alia*, "espoused the following positions: (1)

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<sup>1</sup> In addition to the Bar, the members of its Board of Governors are named as defendants. P.A. 1a; J.A. 7-8.

opposed tort reform; (2) opposed limitation of damages in medical malpractice actions; (3) opposed changes in the state sales tax; (4) opposed changes in the state's taxation and venue powers; and (5) advocated regulation of child care centers." P.A. 25a n.1; see J.A. 18-24. Nonetheless, the district court entered judgment for the Bar. P.A. 26a, 35a-42a. The court held that the "intrusion into plaintiff's rights occasioned by the Bar's legislative program" is justified by the state's interests in improving the administration of justice and advancing the science of jurisprudence and is sufficiently closely drawn, because the Bar had a policy that its Board of Governors must determine that legislation to be supported or opposed is related to those purposes. P.A. 41a.

Mr. Gibson appealed, and the court of appeals reversed. It ruled that, because first-amendment rights are at stake, the district court erred in relying on the existence of the policy and procedures by which the Bar took political and ideological positions. Rather, the court of appeals held, the Bar has the burden of proving that the actual past positions taken by it "were sufficiently related to its purpose of improving the administration of justice," i.e., that they "relate directly" to "the role of the lawyer in the judicial system and in society." P.A. 32a-33a. The action was remanded for further proceedings consistent with the court of appeals' opinion. P.A. 34a.

On remand, Mr. Gibson sought a preliminary injunction, pending a hearing to determine the damages due him for past unconstitutional use of his dues. He asked that the injunction prohibit further spending of his dues for purposes beyond those authorized by the court of appeals and require the Bar to implement a procedure complying with *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986). J.A. 24-26. In response, the Bar amended its policy to include a procedure by which members objecting to legislative positions may obtain post-collection refunds of part of their dues and moved for "judgment on the mandate" on the ground that its procedure satisfies the requirements set out in *Hudson*. J.A. 29-30.

Mr. Gibson opposed the Bar's motion. He contended that the new procedure is inadequate under *Hudson* and that, before any final judgment can be entered, he is entitled to an evidentiary hearing on the issue of damages for past improper uses of his dues. J.A. 30-31. At a hearing on the Bar's motion, Mr. Gibson presented evidence that the Bar continued to use his dues for a broad range of lobbying purposes not permitted by the court of appeals' decision and again asserted that the court must determine the damages due him for past unconstitutional spending. J.A. 32-39. However, the district court merely ordered the proceedings held in abeyance for seventy days to permit the Florida Supreme Court to take action concerning the Bar's amended policy. J.A. 39-40.

The Bar later reported that it could not obtain the Florida court's approval within the seventy-day period. J.A. 40-41. Mr. Gibson then renewed his motion for injunctive relief and repeated his contention that "the element of damages" remains and "require[s] an evidentiary hearing." J.A. 41-42. The district court refused to rule on Mr. Gibson's motion and twice extended the period within which the case was stayed, until the Bar's procedure was incorporated in a bylaw amendment and approved by the Florida Supreme Court. J.A. 43-44, 47-48. That approval was given in *Florida Bar Re Amendment to Rule 2-9.3 (Legislative Policies)*, 526 So. 2d 688 (Fla. 1988) (J.A. 48-49).

Under the amended bylaw, when the Bar adopts a legislative position, it publishes notice of that action in the next issue of the twice-monthly *Florida Bar News*. A member has forty-five days from the notice's publication to "file with the executive director a written objection to a particular position on a legislative issue." The bylaw specifies that failure to object within that period "shall constitute a waiver of any right to object to the particular legislative issue." After an objection is received, the Bar's executive director determines and puts in escrow the pro rata amount of the objector's dues placed in dispute by his objection pending determination of its merits. The Board of Governors then has forty-five days to decide whether to refund that amount or refer the objection to binding arbitration as to "whether the



legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues" or must be subject to a refund, with interest. P.A. 6a n.8, 8a-9a.

After hearing argument on Mr. Gibson's still pending motion for injunctive relief, the district court entered a final order denying his motion and dismissing the action on the ground that the amended bylaw "meets the safeguards and requirements necessary for protection of members' first amendment rights." P.A. 22a-23a. Mr. Gibson again appealed. This second appeal challenges the constitutionality of the Bar's amended bylaw and the district court's failure to order a refund of the part of his dues spent for constitutionally objectionable purposes in the past. P.A. 8a-9a & n.11.

The court of appeals affirmed in substantial part, holding that the amended bylaw is constitutional, in all but one minor respect, and that Mr. Gibson is not entitled to damages. P.A. 9a n.11, 13a-16a. Circuit Judge Clark, dissenting, agreed with Mr. Gibson that this Court's precedents concerning compulsory union and bar dues require an advance reduction, rather than a refund, and prohibit requiring objections issue-by-issue, and that Mr. Gibson is entitled to a remedy for past unconstitutional expenditures. P.A. 17a-21a.

### SUMMARY OF ARGUMENT

This Court's decisions establish that the first amendment limits the purposes for which a state bar or labor organization may spend monies paid by an individual as a condition of the practice of law or employment. The Court also has held that, to collect coerced dues or fees, a bar or union must implement procedural safeguards that protect the individual's right to refrain from subsidizing constitutionally nonchargeable activities. The Court has not yet explicitly defined those procedures in the bar context. But, in the union context, in *Hudson*, it did so and declared that procedures designed to protect the first-amendment right not to speak and not to associate must be carefully tailored.

Because the individual's rights are identical in the two contexts, and the state interests are of the same weight, the procedure in the bar context must be equally carefully tailored and provide at least the same protections as those that *Hudson* prescribed in the union context. The procedures adopted by the Bar and upheld by the lower courts in this case fail that test in four respects.

*First*, they do not provide a pre-collection reduction of an objecting attorney's dues to that amount which the Bar reasonably expects to spend on constitutionally chargeable purposes. Such a reduction is required by *Hudson*, as all other courts of appeals addressing the issue have held. It is necessary, because *collection* of compulsory dues or fees by a membership association *inherently* infringes on first-amendment rights, and because even temporary collection of amounts to which the association has no valid claim unjustifiably deprives the individual of his own property and insures that he cannot use it for causes that he supports. Any burden that calculating an advance reduction, based on the prior year's expenses, might impose on the Bar is insufficient to justify the infringement on individual constitutional rights that occurs absent such a reduction.

*Second*, the scheme here does not provide an independently verified disclosure to potential objectors of the basis for the portion of dues that the Bar expects to use for constitutionally chargeable purposes, as *Hudson* requires. Instead, the Bar merely publishes a notice of its action each time that it takes a position on a political or ideological issue, disclosing neither whether it considers the activity chargeable nor what portion of the dues is involved. The inadequacy of those notices is not cured by the Bar's annual publication of a "breakdown" of its budget. That "breakdown" also does not explain which expenditures the Bar considers chargeable and why, which is what an attorney needs to know to decide intelligently whether to object or not.

*Third*, the Bar does not permit a general, standing objection to any use of a member's dues for constitutionally objectionable purposes. Instead, the Bar requires the member to monitor its



twice-monthly publication for notices of the taking of positions on political and ideological issues and to object to the specific position(s) every time notice is published. That requirement violates the mandate of *Hudson* that the procedure for objection facilitate, not discourage, dissent. It is also contrary to the explicit holding of *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977), that requiring specific objections invades the individual's right to privacy of belief and is unduly burdensome.

*Fourth*, the Bar's procedure does not give attorneys notice of the reduced dues amount and opportunity to object and put disputed amounts in escrow before the Bar obtains use of them. Instead, the Bar first collects full dues and only later gives notice and provides escrow after it has taken positions on legislative issues and, thus, spent part of the dues on the disputed activity. However, as all other courts of appeals that have addressed the issue have held, *Hudson* requires that the notice which triggers escrow *precede* the collection of any compulsory fees. This defect in the Bar's procedures is not cured by the fact that the Bar may later make a rebate, because *Hudson* prohibited schemes which permit even temporary spending of objectors' dues for constitutionally impermissible purposes.

Finally, the lower courts erred in denying Mr. Gibson a trial to determine how much of his dues was misspent in the past. Under this Court's applicable decisions, his general prayer for relief is sufficient to state a claim for a refund, and the Bar had the burden of proving what proportion of his compulsory dues was used for constitutionally chargeable purposes. Mr. Gibson repeatedly requested a trial on the issue. But, he was improperly denied one when the district court dismissed the case because it found that the Bar's procedures satisfy *Hudson*. That dismissal cannot be justified on the alternative ground raised by the Bar, that it is a "state agency" immune from damages under the eleventh amendment to the United States Constitution. This Court has held that another state bar, possessing the same characteristics as the Florida Bar, is not a "state agency" for purposes of federal constitutional law.

## ARGUMENT

### I. THE PROCEDURES FOR COLLECTING COMPULSORY DUES MUST BE CAREFULLY TAILORED, BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF DUE PROCESS IN PROTECTING FIRST-AMENDMENT FREEDOMS

Last Term, this Court held in *Keller v. State Bar*, 110 S. Ct. 2228 (1990), that the first amendment limits the purposes for which an "integrated" or "unified" state bar may exact dues which members pay as a condition of the practice of law. The use of compulsory bar dues to finance political and ideological activities to which an attorney objects violates his first-amendment rights of free association and speech when such expenditures are not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 2233-37 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

The Court also held that as a pre-condition to collecting compulsory dues an integrated bar must adopt procedures to prevent the use of objectors' dues for constitutionally impermissible purposes, such as "the sort of procedures described in *Hudson*," a case involving compulsory union fees. Because the state bar in *Keller* had no procedures for dealing with objections, the Court did not determine there "whether one or more alternate procedures would likewise satisfy that obligation." *Id.* at 2237-38. This case presents such significant questions of first-amendment due process for the first time in the context of the compulsory bar.

Freedoms guaranteed by the first amendment are "rights which we value most highly and which are essential to the workings of a free society." In protecting first-amendment rights, "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." *Speiser v. Randall*, 357

U.S. 513, 520-21 (1958); see *Hudson*, 475 U.S. at 303 n.12. Consequently, in *Hudson*, 475 U.S. at 302-03 & n.11 (emphasis added) (footnote omitted), the Court relied on *Elrod v. Burns*, 427 U.S. 347, 363 (1976) (plurality opinion), and other earlier statements of the rule of first-amendment strict scrutiny, for the holding that,

although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be *carefully tailored* to minimize the infringement.

Self-evidently, the "First Amendment does not distinguish between lawyers and other occupations." *Arrow v. Dow*, 544 F. Supp. 458, 460 (D.N.M. 1982). And, the state's interest purportedly served by a mandatory bar is no weightier than the governmental interest that agency-shop arrangements are thought to serve. *Keller*, 110 S. Ct. at 2236. Thus, because there is "a substantial analogy" between the integrated bar and compulsory union fee arrangements, the Bar is "subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees." *Id.* at 2235. Here then, as well as in the union context, the first amendment requires careful tailoring of the procedure. However, the Bar's procedure fails that test in several respects.

## II. IN NOT REQUIRING AN ADVANCE REDUCTION, THE PANEL MAJORITY'S DECISION IGNORES THE FACT THAT AN IMPORTANT PURPOSE OF THE HUDSON PROCEDURES IS TO AVOID EXCESSIVE COLLECTION

The panel majority held, with Judge Clark dissenting, that the Bar need not provide an objector an advance reduction for the proportion of dues that it expects to use for political activity, because "an interest-bearing escrow account (along with an

otherwise satisfactory procedure) is sufficient." P.A. 13a-14a; *contra* P.A. 17a-21a & n.3 (Clark, J., dissenting). That holding conflicts with this Court's decision in *Hudson*.

The panel majority relied on the fact that *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984), identified "advance reduction of dues and/or interest-bearing escrow accounts" as "readily available alternatives" to the statutorily and constitutionally impermissible "pure rebate approach." See P.A. 14a. However, as Judge Clark said, P.A. 18a, the "majority simply misreads" *Hudson* in not recognizing that the later case requires *both* escrow *and* advance reduction.

As *Hudson* explained, *Ellis* merely "noted the possibility of 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts.'" *Ellis* did *not* decide whether an interest-bearing escrow account without advance reduction would be constitutionally sufficient. *Hudson*, 475 U.S. at 304 (quoting *Ellis*, 466 U.S. at 444).

That question was reached for the first time in *Hudson*, because the union there had established an escrow for 100% of objectors' service fees. This Court held that *in addition* to that escrow, and other safeguards, an "appropriately justified *advance reduction* \* \* \* [is] necessary to minimize both the impingement [of the agency shop on employees' first-amendment interests] and the burden" of objection. It would hardly have been necessary for the Court to hold that the union must "provide *adequate justification* for the advance reduction of dues," *id.* at 309 (emphasis added), if, as the panel majority here said, no advance reduction at all were required.

The basic flaw in the panel majority's reasoning is its failure to recognize that "'preventing compulsory subsidization of ideological activity'" was not the *sole* "'objective' of the procedures" that *Hudson* mandated. See P.A. 11a (quoting *Hudson*, 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237)). Were that true, *Hudson*, 475 U.S. at 310 (emphasis added), need not have announced "constitutional requirements for the Union's



collection of agency fees," and would have prescribed only *post*-collection protections. But *Hudson* required more. The Court agreed that the union's 100% escrow "eliminates the risk that nonunion employees' contributions may be temporarily used for impermissible purposes." *Id.* at 309. Nonetheless, it did not hold that the only other safeguard needed was an impartial decision-maker to determine how much the union could lawfully spend.

Rather, *Hudson* also required *pre*-collection protections: an "appropriately justified advance reduction" to an amount that includes only clearly or arguably chargeable costs and advance disclosure of the basis for that amount. *See id.* at 306-07, 309-10. The Court found those pre-collection safeguards necessary for two reasons: first, "because the agency shop *itself*"—i.e., the collection of compulsory union fees even for constitutionally permissible purposes—"impinges on the nonunion employees' First Amendment interests," *id.* at 309 (emphasis added); and, second, because "the procedures required by the First Amendment also provide the protections *necessary* for any deprivation of property," *id.* at 304 n.13 (emphasis added).

A requirement that objectors pay into escrow monies to which a union or bar undoubtedly is not entitled is both an unjustifiable burden on the objectors' right to their own property and an infringement upon first-amendment interests. As Justice Brennan said in *Elrod*, 427 U.S. at 355-56, a likely consequence of the compelled financial exaction is that "the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained." *Accord Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970).

All other United States courts of appeals that have considered the question have concluded, contrary to the panel majority, that an advance reduction is constitutionally required under *Hudson*.

In *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991), the court explained that the

core principle underlying all of the decisions prescribing allocation procedures is that the correct amount of a service fee to be charged nonunion employees for collective bargaining must be established, to the extent practicable, *in advance*. \* \* \*

\* \* \* [T]his underpinning principle mandates that the union follow required procedures in advance of assessing a fee \* \* \*.

Two different panels of the Sixth Circuit court of appeals have ruled that

*Hudson* clearly rejects the premise that a union may continue to collect a service fee equal in amount to the union dues once a non-union member has objected to such a procedure. Rather, the union must instead deduct from the service fee that amount which is undisputedly used for political or ideological purposes.

*Damiano v. Matish*, 830 F.2d 1363, 1369 (6th Cir. 1987); *accord Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987). In *Damiano*, 830 F.2d at 1369-70, the court explained that this "advanced reduction method is clearly a less burdensome method of accommodating non-union employees," because escrow of the part of dues that indisputably represents *nonchargeable* expenses "would unduly deny the employee's unqualified right to his property" and "insure that the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes."

The Ninth Circuit has explicitly rejected the view of the panel majority in this case and followed the Sixth Circuit to "hold that advance reductions of agency shop fees are required by *Hudson* even where the agency fee procedure includes an escrow of 100% of the collected agency fees." *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir.

1990) (2-1 decision).<sup>2</sup> A procedure under which the union collects more than "a reasonable estimate of the percentage of fees attributable to" constitutionally chargeable costs is not the "carefully tailored" procedure required by *Hudson*, 475 U.S. at 303, for the collection of compulsory fees. *Grunwald*, 917 F.2d at 1228. See also *Dean v. TWA*, 924 F.2d 805, 809 (9th Cir. 1991) (where a union had no *Hudson* procedures at all, a nonmember was justified in unilaterally reducing his agency fees, and his discharge for doing so was unlawful).

*Hudson* and its progeny cannot be distinguished on the theory, advanced in the court of appeals, "that when Bar dues are assessed \* \* \*, the Bar does not yet know what political activity it will undertake in the coming year." P.A. 13a-14a. That is equally true when a union sets its dues amount before a fiscal year begins. *Hudson*, 475 U.S. at 307 n.18, took that fact into account by permitting the advance reduction to be based on the preceding year's expenditures.

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<sup>2</sup> *Grunwald*, 917 F.2d at 1227, though, incorrectly cites *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989) (argued en banc Oct. 3, 1989), *Hohe v. Casey*, 868 F.2d 69 (3d Cir.), cert. denied, 110 S. Ct. 144 (1989), and *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335 (2d Cir. 1987), as holding that no advance reduction is required by *Hudson*. *Crawford*, 870 F.2d at 161, so held, but was vacated by the grant of rehearing en banc. See *id.* at 155; 4th Cir. R. 35(c). Another panel of the Fourth Circuit has since concluded, in *Dashiell*, 925 F.2d at 756, that pre-collection calculation of a reduced fee is required. *Hohe*, 868 F.2d at 70, 74 n.7, was decided on appeal from denial of a preliminary injunction and was "not intended to intimate any opinion regarding the ultimate merits"; moreover, the procedure in *Hohe* provided an advance reduction, see *Hohe v. Casey*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), cert. denied, 110 S. Ct. 144 (1989). Advance reduction also was not an issue, and apparently was part of the procedure, in *Andrews*, 829 F.2d at 337-41. Cf. *Price v. Auto Workers*, 136 L.R.R.M. (BNA) 2641, 2643 (D. Conn. 1990) (a union that "collected fees from [nonmembers] without discounting the amount for any percentage expended on matters unrelated to collective bargaining, contract adjustment, and grievance adjustment" violated its duty of fair representation under *Communications Workers v. Beck*, 487 U.S. 735 (1988)).

Indeed, *Keller* agreed that a bar would not have to determine whether the expenditure will be chargeable "'prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter.'" But, it held, the "'burden or inconvenience'" of performing that analysis once a year for all of its expenditures and giving it to all members *before* collecting their annual dues "'is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 110 S. Ct. at 2237 (quoting with approval *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 255 Cal. Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., dissenting)); see *Hudson*, 475 U.S. at 306-07; see also *Ellis*, 466 U.S. at 444 ("administrative convenience" is not sufficient justification for denying objectors an "advance reduction of dues and/or interest-bearing escrow account").

Thus, the panel majority erred in holding that the Bar's procedure satisfies *Hudson*, even though that procedure does not afford objecting attorneys a pre-collection reduction of their dues to only that amount which the Bar expects to use for purposes it can constitutionally charge to them.

### III. IN NOT MANDATING NOTICE OF THE REDUCED DUES AMOUNT BEFORE DUES ARE COLLECTED, AND IN REQUIRING ATTORNEYS TO OBJECT EACH TIME THE BAR TAKES A POLITICAL OR IDEOLOGICAL POSITION, THE PANEL MAJORITY'S DECISION DENIES ATTORNEYS A FAIR OPPORTUNITY TO OBJECT AND PERMITS TEMPORARY MISSPENDING

Under the Bar's scheme, members must pay their full annual dues on or before July 1 of each year, the beginning of the Bar's fiscal year. Fla. Stat. Ann., Rules Regulating Bar, Rule 1-7.3, 2-6.2 (West Supp. 1990). Later, during the fiscal year, the Bar gives notice each time that it takes a position on a legislative issue, and members must within forty-five days file an objection to that particular position or waive their right to object. Only then is some portion of the dues escrowed and, possibly, rebated. P.A. 6a n.8, 8a-9a. The panel majority, with Judge Clark



dissenting, held that rebate scheme constitutional, despite the lack of pre-collection notice and the requirement of multiple, issue-by-issue objections. P.A. 15a-16a; *contra* P.A. 20a-21a & n.4 (Clark, J., dissenting). That ruling conflicts with this Court's decisions in *Hudson* and the other, earlier compulsory union fee cases on which *Keller* relied.

The minimum "constitutional requirements for the \* \* \* collection of [compulsory union and bar] fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310; *see Keller*, 110 S. Ct. at 2237. The scheme approved by the panel majority satisfies *none* of these requirements.

**A. Adequate Notice Requires an Audited Explanation  
Of the Calculation of the Chargeable Amount**

Under the Bar's procedure, potential objectors are provided inadequate information about the basis for the portion of dues that the Bar claims they must pay. *Hudson*, 475 U.S. at 306, held that "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Aboud*." Adequate disclosure requires a union seeking to collect a compulsory fee to "identif[y] the [major categories of] expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers," verified "by an independent auditor." Merely identifying expenditures for purposes the union concedes cannot be charged to objectors "was not an adequate disclosure of *the reasons why* they were required to pay" the portion of dues demanded. *Hudson*, 475 U.S. at 306-07 & n.18 (emphasis added).

In the bar context, adequate explanation of the basis for what an objecting attorney must pay includes the major categories

of expenses, verified by an independent auditor, that the bar claims "are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State,'" *Keller*, 110 S. Ct. at 2236 (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)). As *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 634-35 & n.22 (1st Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3674 (U.S. Mar. 20, 1991) (No. 90-1470), held, an integrated bar must provide members with a notice "that classifies activities as appropriate or inappropriate for mandatory financing" and supports the percentage of dues that the bar claims to be chargeable to objectors.

Such an explanation obviously is not provided by periodic notices which merely report that the Bar has taken a legislative position. Indeed, the Bar's notices provide far *less* information than the disclosure held constitutionally inadequate in *Hudson*, 475 U.S. at 306-07, which at least told nonmembers what part of a member's dues they were not required to pay. Here, an attorney must object even to find out whether the Bar claims that expenditures concerning the legislation in question are chargeable and what portion of his dues are used to fund that activity. *See* P.A. 6a n.8.

In its Brief in Opposition to Petition for Writ of Certiorari ("Opposition") at 5, the Bar contended that any deficiency in its periodic notices is cured by the fact that it provides members notice of its budget and "annually publishes a complete breakdown of expenditures by specific category," with percentages and dollar amounts.

However, *Hudson*, 475 U.S. at 306-07 (emphasis added), held that to be adequate the disclosure must "*identif[y] the expenditures for collective bargaining and contract administration \* \* \* for which nonmembers as well as members can fairly be charged a fee.*" Merely furnishing a copy of a union's basic financial statement or budget does not satisfy that requirement. *See Tierney*, 824 F.2d at 1501, 1506 (budget); *Mitchell v. Los Angeles Unified School Dist.*, 744 F. Supp. 938, 940-41 (C.D. Cal.

1990) (financial statement); *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989) (financial statement); *Gillespie v. Willard City Bd. of Educ.*, 700 F. Supp. 898, 900-02 (N.D. Ohio 1987) (budget); *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986) (budget), *aff'd on other grounds*, 881 F.2d 1388 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 2616 (1990); *Harrison v. Massachusetts Soc'y of Professors*, 405 Mass. 56, 63-64 & n.8, 537 N.E.2d 1237, 1242 & n.8 (1989) (financial report).

More is required, "because audited financial statements [and budgets] typically do not involve verification for expenditure categories based on the types of activities pertinent to the *Hudson* notice (representational vs. political/ideological)." *Mitchell*, 744 F. Supp. at 941. To satisfy *Hudson*, the notice must explain which expenditures the organization demanding the fee considers chargeable and why: "The whole point of providing the notice [to] nonmembers was to give them enough information to decide whether to challenge the fair share fee. That would require a breakdown between chargeable and nonchargeable costs." *Hohe*, 727 F. Supp. at 167; *accord Mitchell*, 744 F. Supp. at 940-41; *see Schneider*, 917 F.2d at 634-35 & n.22; *Tierney*, 824 F.2d at 1504; *Ellis v. Western Airlines*, 127 L.R.R.M. (BNA) 2550, 2552-53 (S.D. Cal. 1987); *Lehnert*, 643 F. Supp. at 1331; *Harrison*, 405 Mass. at 64 n.8, 537 N.E.2d at 1242 n.8.

The Bar's budget and "breakdown" of expenses do not meet that requirement, because, like the financial statements and budgets found inadequate in the union cases, they do not identify expenses as chargeable or not. The breakdown published in the September, 1988, *Florida Bar Journal*, which was attached to the Bar's brief in the court of appeals, is reproduced in the Joint Appendix at 60-62. It reveals only what the Bar spends in total on, e.g., "Public Information," "Public Interest Programs," and "Legislation." It does *not* anywhere give "the potential dues reimbursement figure," as the Opposition at 6 disingenuously said. Nor does it tell potential objectors the portion of each category that the Bar considers chargeable, much less "the reasons why they were required to pay their share of" those expenditures, as *Hudson*, 475 U.S. at 307, mandates.

## B. The Requirement of Multiple Objections Unduly Burdens the Exercise of the Right to Object

In requiring an objection *every time* the Bar takes a legislative position, the Bar's scheme fails to provide "an expeditious, fair, and objective" means of challenging the amount of the dues before an impartial decisionmaker. Because first-amendment rights are at stake, the procedures for asserting objection must "facilitate [an individual's] ability to protect his rights." *Hudson*, 475 U.S. at 307 & n.20. That means they "must not be framed so as to discourage the exercise of \* \* \* First Amendment rights by intimidation or the imposition of unrealistic and excessively complex procedural requirements." *Tierney*, 824 F.2d at 1503.

Not permitting a standing objection to all nonchargeable exactions unduly burdens the individual's ability to protect his first-amendment rights, as the Court explicitly held in *Abood*, 431 U.S. at 241 (footnote omitted):

To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

The panel majority's assertion that the Bar's scheme does not confront an individual attorney with the dilemma identified in *Abood*, because an "objector need not provide any \* \* \* information concerning the motivation for his objection or his own position concerning the legislative policy at issue," P.A. 15a-16a, is completely disingenuous. As *Abood*, 431 U.S. at 241 & n.42, explained, requiring an objector to specify the causes which he does not want to support financially "necessarily discloses, by negative implication, those causes [he] does support."



Moreover, regardless of what must be included in an objection, the Bar's scheme places on the individual attorney "the considerable burden of monitoring," *id.* at 241, the Bar's publication twice a month to determine whether it has taken positions on political, ideological, and other nonchargeable matters which he does not want to subsidize and of objecting every time it has.<sup>3</sup> A similar burden was found to be sufficient reason to invalidate the objection procedure of the integrated bar of Puerto Rico. *Schneider*, 917 F.2d at 634-35.

In its Opposition at 7, the Bar tried to justify imposing that burden on the individual, by asserting that the general objections approved in *Abood* would somehow place on it "an unfair burden" of "either making a full refund to objecting members, regardless of the merit of their objection, or funding the cost of a full arbitration proceeding on every" legislative or political issue on which the Bar presumes that it can spend objectors' dues. That argument is disingenuous, *because the Bar has precisely that burden under its existing scheme*. That is, if a member opposes use of his dues for *any* constitutionally nonchargeable purpose (as Mr. Gibson does, *see* P.A. 2a), carefully monitors the Bar's publication twice a month to determine when it engages in arguably nonchargeable activity, and objects and specifies the activity every time it does, then, under its own scheme, the Bar must either refund for all of those activities or pay for arbitration on every issue that he has challenged.

In short, the Bar's preference for multiple, specific objections can only be for the purpose of *discouraging* dissent. That purpose is, of course, contrary to not only *Abood*, but the mandate of *Hudson*, 475 U.S. at 307 n.20 (emphasis added), that the Bar provide procedures "that *facilitate* a [member's] ability to protect his rights."

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<sup>3</sup> The record shows that, to avoid waiving his rights under the Bar's scheme in 1986, e.g., an attorney would have had to object at least six separate times and specify some twenty-nine legislative positions of the Bar which he did not want to support. *See* J.A. 32-35.

### C. The Bar's Scheme Permits It to Spend Objectors' Dues for Constitutionally Impermissible Purposes

The notice and subsequent escrow under the Bar's scheme are untimely. One purpose of the disclosure "of the basis for the fee" and "escrow for the amounts reasonably in dispute" is to "avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Hudson*, 475 U.S. at 305, 310. A "remedy which merely offers dissenters the possibility of a rebate does not avoid" that risk and thus is constitutionally inadequate. *Id.* at 305-06; *accord Ellis*, 466 U.S. at 443-44. In short, *Hudson* requires that the notice which triggers escrow *precede* the collection of any compulsory fees.<sup>4</sup>

The other federal courts of appeals that have addressed the issue in union cases have all held, contrary to the panel majority here, "that notice of and adequate information concerning the agency fee must be given to all nonmembers *before* any fees may be collected from them." *Grunwald*, 917 F.2d at 1228 (9th Cir.); *accord Dashiell*, 925 F.2d at 754 (4th Cir.); *Dean*, 924 F.2d at 808 (9th Cir.); *Tierney*, 824 F.2d at 1503 (6th Cir.); *see also Harrison*, 405 Mass. at 64, 537 N.E.2d at 1242 ("If the financial information is to be useful to a nonmember's decision whether to pay the fee or to challenge it, the information must come with, or prior to, the agency fee demand").

Moreover, in *Schneider*, 917 F.2d at 634 (emphasis added), the First Circuit held that a bar's objection procedure was invalid under *Hudson*, because, like the scheme here, it did not oblige the bar "at the outset of a dues year to categorize its \* \* \* actual anticipated expenditures" as chargeable or not so that individual

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<sup>4</sup> That is consistent with the usual constitutional requirement: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950)) (emphasis added); *see Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972).



attorneys have sufficient information to determine whether they wish to object.<sup>5</sup>

Under the Bar's procedure, notice, opportunity to object, and subsequent escrow do not occur until after the member's dues have been collected, and the Bar has been able to spend them. Thus, there is both a certainty that some portion of the dues will be spent on the *process of adopting* legislative positions, because notice is not even given until *after* that has occurred, and a risk that still more will be spent on the advocacy of those positions during the time that it takes for notice to be given in the Bar's publication and objection made by the individual attorney. As Judge Clark understood, the "Bar plan is a pure rebate plan which \* \* \* uses Gibson's dues until he complains," a feature which has "been declared unconstitutional in several Supreme Court cases." P.A. 21a (dissenting).

#### IV. THE PANEL MAJORITY ERRED IN DENYING A REFUND FOR PAST UNCONSTITUTIONAL SPENDING

##### A. That Ruling Conflicts with This Court's Decisions as To What Is a Sufficient Prayer for Relief and Who Has The Burden of Proof in Compulsory Fee Cases

The panel majority, with Judge Clark dissenting, denied Mr. Gibson a refund of the part of his compulsory dues that the Bar had already used to fund its nonchargeable political and ideological activities. P.A. 9a n.11; *contra* P.A. 19a-20a (Clark, J., dissenting). The majority declined to decide whether Mr. Gibson is entitled to a refund, because, it said, he "made no request for a refund or for monetary damages in his complaint; nor did he

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<sup>5</sup> *Schneider* would erroneously allow the bar to escrow the anticipated nonchargeable portion of dues, rather than provide an advance reduction as required by *Hudson*, *Damiano*, *Tierney*, and *Grunwald*. Compare *Schneider*, 917 F.2d at 634 with *supra* pp. 10-15. However, the objecting attorneys in *Schneider* apparently did not argue that advance reduction is required.

present any evidence on this issue at trial or on remand." P.A. 10a n.11. The first of those grounds for denying retroactive relief is clearly erroneous as a matter of fact, and both grounds are contrary to this Court's applicable decisions as a matter of law.

Mr. Gibson *did* request a refund or monetary damages, for his complaint prays for not only declaratory and injunctive relief, but also "all other relief to which Plaintiff appears to be entitled." J.A. 12. Moreover, *Abood*, 431 U.S. at 241-42 & n.43, held that such a "general prayer" for other relief is as a matter of law sufficient to entitle objecting compulsory fee payors "to appropriate relief, such, for example, as the kind of remedies described in" *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963). Those remedies included "the refund of a portion of the [past] exacted funds in the proportion that union political expenditures bear to total union expenditures." *Abood*, 431 U.S. at 240; *see id.* at 238.

The panel majority's denial of a refund on the ground that Mr. Gibson presented no evidence as to what refund he is due, P.A. 10a n.11,<sup>6</sup> assigns to him a burden of proof that is contrary to all of the Court's agency-shop decisions from *Allen* through *Hudson*. As summarized in *Hudson*, 475 U.S. at 306 & n.16 (emphasis added), the "nonmember's 'burden' is simply the obligation to make his objection known"; "*the union* retains the burden of proof" as to the proportion of its expenditures that are constitutionally chargeable. *Accord Ellis*, 466 U.S. at 457 n.15; *Abood*, 431 U.S. at 239-41 & nn.39-40; *Allen*, 373 U.S. at 118-19 & n.6, 122.

Apparently recognizing that the reasons stated by the panel majority were insufficient to deny Mr. Gibson's claim for monetary damages, the Bar's Opposition at 8 argued that there

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<sup>6</sup> Mr. Gibson did present evidence, both before and after the remand, of political and ideological positions taken by the Bar in the past. *See* P.A. 25a n.1; J.A. 18-24, 32-37; *see also* J.A. 50-58 (affidavit of the Bar's executive director attaching a compilation of legislative positions of the Bar).

was another reason for the majority's ruling. The Bar there asserted that Mr. Gibson requested a refund of the portion of his dues expended for nonchargeable purposes "at the appellate level for the first time." That assertion is untrue.

Gibson's motion in the district court for injunctive relief pending final hearing said that a "money judgment" in the form of a rebate of the part of his dues "used for ideological purposes" is "clearly required" in addition to injunctive relief. J.A. 26. His response to the Bar's motion for final judgment explicitly requested that the Bar's motion be denied, because "it is necessary for the Court to receive further evidence" on issues other than the constitutionality of the Bar's rebate scheme before final judgment can be entered, "particularly damages for past improper uses of GIBSON's funds." J.A. 31.

Then, when the district court heard argument on the Bar's motion, Gibson argued that "the court must determine if the positions taken by the Bar in the past, \* \* \*, through today's date, \* \* \* were within the limited area" permitted by the court of appeals' first decision in this case and "fashion a remedy that will include restitution of moneys taken from Mr. Gibson unlawfully in the past." J.A. 36-37. And, his contention that "the element of damages" remains and "require[s] an evidentiary hearing" was stated for a fourth time when he renewed his motion for injunctive relief. J.A. 42.

In short, Gibson did not fail to raise the issue of damages in the district court on remand from the court of appeals' first decision. He raised it *repeatedly* and requested an evidentiary hearing on the issue, but was denied that hearing when the district court held that the Bar's scheme satisfies *Hudson*, denied his motion for injunctive relief, and dismissed the case on the erroneous ground that "no subsequent proceedings are necessary." P.A. at 22a-23a. Therefore, the question of the propriety of that ruling is properly before this Court, and it is erroneous under the Court's applicable precedents.

## **B. *Keller* Forecloses the Bar's Claim That It Is a "State Agency" Possessing Eleventh-Amendment Immunity**

In its Opposition at 8-9, the Bar argued that it is "a 'state agency'" and, as such, immune from damages under the eleventh amendment. While that contention was questionable even before *Keller*,<sup>7</sup> it is clearly without merit now.

The Bar claims to be a state agency, because the Florida Supreme Court declared by order that the Bar is "'an official arm of the Court.'" Opposition at 9 (quoting Fla. Stat. Ann., Rules Regulating Bar, ch. 1 (West Supp. 1990)). However, "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). *Keller*, 110 S. Ct. at 2234, held that the California Supreme Court's ruling that the California Bar is a state agency is "not binding on us when such a determination is essential to the decision of a federal question."

What is a state agency for purposes of the first or eleventh amendment clearly is a federal question. The answer to that question "depends, at least in part, upon the nature of the entity created by state law." *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977). *Keller*, 110 S. Ct. at 2234-35, held that the California Bar is not a "government agency" for purposes of

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<sup>7</sup> *Levine v. Wisconsin Supreme Court*, 679 F. Supp. 1478, 1487-88 (W.D. Wis.), *rev'd on other grounds sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, 110 S. Ct. 204 (1989), held that the Wisconsin Bar is not a state agency immune under the eleventh amendment from damages for the misuse of compulsory dues, because its funds are not deposited in state accounts and "it is largely a self-governing entity." In contrast, *Krempp v. Dobbs*, 775 F.2d 1319, 1321 & n.1 (5th Cir. 1985), held, with far less analysis, that the Texas Bar is a state agency immune from suit. *Levine*, 679 F. Supp. at 1488 & n.3, distinguished *Krempp* on the ground that the Texas Bar is a state agency by virtue of state statute, unlike the Wisconsin (and Florida) Bar, which has that status only by declaration of the state's supreme court. See Opposition at 9. Under *Keller*, even compulsory state bars which have "state agency" status by virtue of statute probably have no immunity in a suit such as this.

federal constitutional law, "render[ing] unavailing [the] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions." The Florida Bar possesses all of the characteristics on which *Keller* relied:

- "Its principal funding comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors." *Id.* at 2234; see Fla. Stat. Ann., Rules Regulating Bar 1-7 (West Supp. 1990); J.A. 60-61.
- "Only lawyers admitted to practice in the State of California are members of the State Bar, and all \* \* \* lawyers admitted to practice in the State must be members." *Keller*, 110 S. Ct. at 2234-35; see Fla. Stat. Ann., Rules Regulating Bar 1-3 (West Supp. 1990).
- The services provided "for the State by way of governance of the profession" are "essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by \* \* \* law to the State Supreme Court." *Keller*, 110 S. Ct. at 2235; see Fla. Const. art. V, § 15; Fla. Stat. Ann., Rules Relating to Admissions to Bar (West 1983 & Supp. 1990); Fla. Stat. Ann., Rules Regulating Bar 1-10, 3-1.2, 3-3.1, 3-7.6 (West Supp. 1990).

In sum, *Keller* conclusively establishes that the Florida Bar has no eleventh-amendment immunity in this action.

### CONCLUSION

When a state compels an individual to pay a fee to a union or bar association as a condition of employment or the practice of a profession, it infringes on his or her rights of free speech and association. See *Keller*, 110 S. Ct. at 2233-36. This Court

confirmed in *Hudson*, 431 U.S. at 303, that "the fact that those rights are protected by the First Amendment requires that the procedure [for collection of the fee] be carefully tailored to minimize the infringement."

As shown above, the decision of the court of appeals' panel majority in this case ignores that general rule of first-amendment law and approves procedures which omit important, minimum constitutional safeguards explicitly mandated by *Hudson* and its precursors. Moreover, the panel majority repudiates fundamental rules of pleading and of burden of proof which this Court has held necessary to protect individual rights in causes of action like this. Therefore, the judgments below should be reversed, and the case remanded to the district court with instructions to grant Mr. Gibson's motion for preliminary injunctive relief and to proceed to trial on the issue of the damages to which he is entitled for past unconstitutional use of his dues.

Respectfully submitted,

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**ROBERT E. GIBSON,**

*Petitioner,*

v.

**THE FLORIDA BAR, et al.,**

*Respondents.*

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**On Writ Of Certiorari To The United States  
Court Of Appeals For The Eleventh Circuit**

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## SUMMARY OF ARGUMENT

This Court has not imposed an inflexible standard for the administration of compulsory dues and agency fees use. In *Abood*, *Ellis* and *Hudson* the Court acknowledged that organizations could experiment with different approaches to meet their particular circumstances so long as the dues payer's rights were adequately protected. The Florida Bar does not intentionally budget for nonchargeable uses as a matter of policy. While particular dues uses might ultimately be found to be nonchargeable, there is no way to know prior to dues collection what the number of such uses will be or the proportion of the dues dollar such uses will constitute. An advance reduction scheme would necessarily be based upon arbitrary calculations. The Florida Bar's system, which escrows 100% of an objector's pro rata share of the entire legislative budget and pays interest from the date the member's dues were received, fully protects the member's constitutional interests and is a more practicable approach to the realities of The Florida Bar's budget process and programming.

The advance reduction issue is not grounded on any recognized constitutional principle. This Court's expressed concern has been with the "*compulsory subsidization of ideological activity*". In the absence of a due process or equal protection claim or some other special "burden" on the exercise of free speech, the Court has not heretofore recognized that collection alone implicates constitutional rights. The Florida Bar's escrow procedure fully protects an objecting member from use of his or her dues for nonchargeable purposes. The petitioner's challenge is erroneously directed at the collection rather than the expenditure stage of the dues process.

The Florida Bar's objection procedure requires an objecting member to indicate only which issues he or she believes to be nongermane to an integrated Bar's constitutionally justified purpose and thus nonchargeable. The member does not have to disclose his or her ideological position regarding the issue or activity in question. Consequently, the procedure is not analogous to the procedures declared unconstitutional in the anonymous association cases.

The Florida Bar objection procedure places no greater monitoring burden on members than would an advance reduction system since, under such a system, a member would still have to monitor all positions to determine whether he or she agreed with the Bar's designation of an activity as chargeable or nonchargeable.

The "standing objection to all nonchargeable exactions" which petitioner desires presumes, like advance reduction, that proper designation of a particular activity as chargeable or nonchargeable is readily apparent. Most activities, particularly those in the legislative arena, which are the ones challenged in this action, are likely to fall between the extremes so that their designation as chargeable or nonchargeable will be fairly debatable. The requirement that an objecting member indicate which activities or issues he or she believes to be nonchargeable is a reasonable obligation which sets in motion the process to resolve such questions.

A "standing objection to all nonchargeable exactions" would be tantamount to no objection at all. It

would leave the Bar with the unreasonable alternative of automatically returning 100% of the objecting member's pro rata share of the legislative budget, thereby resurrecting the "free rider" problem, or sending every issue to expensive arbitration.

The Florida Bar is mandated by Florida Supreme Court rule to provide every member with detailed notice of *all* budget items at each step of the budget making process. In addition, the membership is given notice of every legislative position taken by the Bar within a reasonably short time after the Board of Governors of the Bar votes on the issue. The budget is not broken down into chargeable and nonchargeable categories or the percentage allocated to each because that information is not known to the Bar at the time the budget is adopted or at the time dues are collected and, given the nature of the legislative process, cannot be known. However, the member, who is given as much information as the Bar itself has, is able to reach his or her own judgment regarding chargeability and file objections accordingly.

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## ARGUMENT

### I. THE FLORIDA BAR'S ESCROW PROCEDURE IS A CONSTITUTIONAL ALTERNATIVE TO ADVANCE REDUCTION AND IS MORE WORKABLE UNDER THE FLORIDA BAR'S BUDGET SYSTEM AND PROGRAMMING

In response to this Court's decision in *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), The Florida Bar acted expeditiously to bring its rules into

conformity with the procedures laid out in that case.<sup>1</sup> The Bar found that the advance reduction scheme utilized by the union in *Hudson* was not practicable in light of the Bar's budget practices. Instead, the Bar adopted a procedure which requires escrow of the "pro rata share of an objecting member's dues at issue" upon the filing of an objection to a legislative position. In administering its rule, the Bar makes a 100% escrow of each dissenting member's pro rate share of the entire legislative<sup>2</sup> budget. The petitioner asserts that advance reduction is always necessary to meet minimal constitutional standards. In support of its position the petitioner seizes upon this Court's statement in *Hudson* that:

The appropriately justified advance reduction and the prompt, impartial decisionmaker are necessary to minimize both the impingement and the burden.

*Id.* at 309. The statement is read out of context by petitioner. The necessity or lack of necessity for an advance reduction was not an issue in *Hudson* because the union in that case had chosen to utilize an advance reduction. The union in *Hudson* had argued that its advance reduction alone was sufficient to meet constitutional standards.

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<sup>1</sup> The delay in adoption of Florida's new procedures, referred to in petitioner's brief, was caused by Florida Supreme Court rules designed to assure that all members would have an opportunity to be heard before major rules revisions.

<sup>2</sup> The Florida Bar recognizes that its *Aboud* obligations are not limited to legislative expenditures. However, the uses now challenged by the petitioners are all legislative and non-legislative expenditures have not been made an issue in this case.

This Court held that *even* the advance reduction was insufficient because the union procedures did not provide for nonmembers to be given adequate information to justify the calculation of the advance reduction and did not provide for an impartial decisionmaker. Thus, the quote relied on by petitioner did not require that there be an advance reduction, but that when an advance reduction is used, it be "appropriately justified" by adequate information.

The *Hudson* decision delineated only three constitutional requisites for the use of compulsory dues for ideological purposes:

We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

*Id.* at 202. Nowhere in the opinion is there a requirement for an escrow *and* an advance reduction. Nevertheless, the circuits have split evenly on the question of whether advance reduction is a constitutional necessity. See *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Grunwald v. San Bernardino School Dist.*, 917 F.2d 1223 (9th Cir. 1990) [holding or suggesting advance reduction necessary] and *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987); *Hohe v. Casey*, 868 F.2d 69 (3d Cir. 1989); *Crawford v. Air Line Pilots Ass'n Intern.*, 870 F.2d 155 (4th Cir. 1989) [holding or suggesting advance



reduction not necessary].<sup>3</sup> Petitioner now seeks resolution of the conflict. A careful analysis of the issue illustrates that while advance reduction is workable and appropriate in some circumstances, it is inherently unworkable in others, including those existent in Florida.

There are two practical problems with the premise that advance reduction is necessary in all circumstances. First, it presumes that every organization will always intentionally budget dues for some uses which are concededly nonchargeable. Certainly in the case of an organization which does do so, advance reduction is feasible and appropriate. In such a situation it is a simple matter to calculate the percentage of the dues budget which that sum constitutes and make an advance reduction. If, for example, an organization earmarks \$10,000 for political campaign contributions within a \$100,000 budget, an indisputably nonchargeable use, there would be no reason not to reduce an objecting member's dues in advance by 10%. However, advance reduction is not practicable when an organization does not intentionally budget for any concededly nonchargeable use. The Florida Bar is such an organization. The Florida Supreme Court has limited the Bar to legislative activities involving

(1) questions concerning the regulation and discipline of attorneys; (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency; (3) increasing the

<sup>3</sup> In *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991), a different panel from that deciding *Crawford v. Air Line Pilots Ass'n.*, supra, implied that advance reduction is necessary. Rehearing en banc was granted in *Crawford* in May 1989, but no opinion has been reported.

availability of legal services to society; (4) regulation of attorneys' client trust accounts; and (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession,

and other issues only when it is determined:

(1) that the issue be recognized as being of great public interest; (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

*The Florida Bar re Schwartz*, 552 So. 2d 1094, 1095 (Fla. 1989). Accordingly, the Bar adopted a 1988-89 budget broken down into the following categories:

- Lawyer Regulation
- Unauthorized Practice of Law
- Client Security Fund
- Journal & News
- Public Information
- Public Interest Programs
- Meetings & Conventions
- Committees & Other Activities
- Section Administration
- Continuing Legal Education Programs
- Legal Publications
- Legislation
- Administration

[Joint App., p. 62] None of these categories is a nonchargeable use per se, see *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and the Bar is not able to determine in advance of dues collection what issues will arise during the budget year. The point is not that The Florida Bar will never expend dues for nonchargeable uses, but that it does not budget for such uses as a matter of policy. It is for this reason, in addition to the reason which follows,

that The Florida Bar has chosen the alternative of an escrow rather than an advance reduction.

Even if Florida did elect to use dues for a nonchargeable purpose, it would not be practicable for it to utilize an advance reduction. As noted, The Florida Bar does not earmark funds for categories which are indisputably nonchargeable. The expenses which have historically drawn challenge and are likely to do so in the future are those in the legislative arena. The legislative process is a dynamic one. It cannot be predicted what issues will become prominent and what new issues will arise. The Bar may know that there will be some nonchargeable uses, but it cannot calculate an advance reduction if it has no way of determining in advance what proportionate share of dues will be allocated to those issues.

In its 1988-89 fiscal year, The Florida Bar budgeted a lump sum \$320,247 for its legislative program.<sup>4</sup> The Bar knew in advance what a number of legislative issues would be and it might be argued that some of them would constitute indisputably nonchargeable uses. However, the Bar did not know, and could not have known in advance what the relative allocation of the budgeted funds to chargeable and nonchargeable issues was going to be.

In *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), the Sixth Circuit suggested that an advance reduction could be calculated ~~upon~~ a projected forecast based upon the percentage "traditionally expended" on chargeable and

<sup>4</sup> Joint Appendix, p.61.

nonchargeable uses.<sup>5</sup> Such a procedure is workable with an organization that has a stable relative allocation of funds between chargeable and nonchargeable uses from year to year. With an organization such as The Florida Bar, however, any effort to calculate an advance reduction based upon past budgets would be entirely arbitrary since the apportionment of The Florida Bar's budget one year affords no predictability as to future years.

The original circumstances leading to the filing of this action by Mr. Gibson provide an excellent example. He originally challenged a Bar position on a proposed amendment to the Florida Constitution. The issue arose within the Bar in March 1984, after the collection of dues for the budget which funded the Bar's activities in connection with the proposed amendment. Any "forecast", assuming that a meaningful one could have been made in the first place, would have been rendered meaningless by the unanticipated introduction of the proposed constitutional amendment after collection of dues.

In the case of unions such as those involved in *Ellis* and *Hudson* which collect dues by monthly or weekly payroll deduction, it would be theoretically possible (although administratively burdensome) to engage in a continuing audit and adjust the amount collected as allocation of the budget to various issues progresses throughout the year. This must be distinguished from The Florida Bar which collects a single annual dues payment. An advance reduction based upon Florida's previous year's allocation would necessarily be arbitrary. For this

<sup>5</sup> *Id.* at 1367 n.5.

Court to mandate such an arbitrary procedure would be to formulate a constitutional principle grounded on a legal fiction having no connection with reality.

In addition to the virtual impossibility of determining in advance the amount of allocation to different issues, advance reduction would also raise difficult administrative problems in the determination of which issues are chargeable and which are not. In *Keller v. State Bar of California*, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), this Court dismissed the California Supreme Court's concern with the "extraordinary burden" of the Bar undertaking a "bill-by-bill, case-by-case *Ellis* analysis" by noting that such an analysis could be avoided if the Bar adopted the procedures described in *Hudson*. That would be true if the interest-bearing escrow account were sufficient to meet constitutional requirements. If, however, advance reduction is always necessary, then there would be no avoiding the necessity of the burdensome *Ellis* analysis decried by the California Supreme Court.

In *Abood*,<sup>6</sup> *Ellis* and *Hudson*, this Court sought to strike a reasonable balance between "preventing compulsory subsidization of ideological activity"<sup>7</sup> and permitting a union sufficient leeway to ensure that all members contribute their fair shares toward financial support of constitutionally justified activities. In doing so, the Court declined to impose a single procedure as the one true answer. In *Ellis* and *Hudson* the Court referred to

<sup>6</sup> *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

<sup>7</sup> *Chicago Teachers Union v. Hudson*, supra at 302.

"readily available alternative such as advance reduction and/or interest-bearing escrow accounts".<sup>8</sup> In *Keller* the Court acknowledged the possibility that "one or more alternate procedures" to those outlined in *Hudson* might be acceptable.<sup>9</sup> Different organizations can be expected to have different budget priorities. Some will concentrate funds in activities, such as political campaigns, which are conducive to advance reduction. Others, such as The Florida Bar, will concentrate on activities such as legislation which are not suitable for advance reduction. The flexibility reflected in *Ellis*, *Abood* and *Keller* accommodates these different systems while protecting the rights of the dues payers.

Because The Florida Bar is unable to determine in advance what the relative allocation of dues will be, it escrows 100% of a dissenting member's pro rata share of the entire legislative budget in an interest-bearing account until an accurate determination can be made. The procedure fully and fairly accommodates both goals which this Court seeks to attain.

The exigencies of the legislative process are such that situations will inevitably arise where action by the Bar must be taken before the objection procedure has time to place a dissenting member's dues in escrow. This problem would exist as well with an advance reduction system if the issue is one which was not contemplated prior to dues collection. The Eleventh Circuit dealt with this

<sup>8</sup> *Ellis v. Railway Clerks*, supra at 444; *Chicago Teachers Union v. Hudson*, supra at 304.

<sup>9</sup> *Keller v. State Bar of California*, supra at L.Ed.2d 16.



contingency by requiring that interest on escrowed funds be calculated from the date such dues are received by the Bar.<sup>10</sup>

Advance reduction is an option by which an organization may choose to meet its *Abood* obligations. However, the suggestion that advance reduction is mandated by the Constitution as the only accepted methodology rests on an invalid premise – that the *collection* of revenue alone implicates First Amendment rights. The issue focuses attention on the wrong end of the revenue procedure. This Court's concern in *Ellis*, *Hudson*, and *Keller* has been with *use* of dues revenues, not their *collection*. Thus, in *Hudson*, the Court quoted its earlier statement in *Abood* that:

The objective must be to devise a way of preventing compulsory *subsidization of ideological activity* by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.

*Hudson* at 302. [emphasis supplied] In the absence of a due process or equal protection claim, or some other special "burden" on the exercise of free speech, which are not claimed here, this Court has never recognized the

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<sup>10</sup> Petition for Writ of Certiorari, p.14a. Since the Eleventh Circuit decision the Bar has amended its rules to provide for calculation of interest from the date of receipt of a dissenting member's annual dues payment. [Brief of Amicus Curiae Frankel and Little, pp. 62a, 64a.]

existence of a constitutional issue at the revenue *collection* stage.<sup>11</sup>

In *Damiano v. Matish*, *supra*, the Sixth Circuit opined that collection of compulsory dues without advance reduction would violate a member's First Amendment rights even if the disputed portion were immediately placed in an interest-bearing escrow account because "the dissenting employee could not use this property for his own preferred political, ideological or other elected purposes." *Id.* at 1370. The implications of such a holding by this Court are sobering. All revenue exactions deprive the payer of the ability to use the funds for his or her "own preferred political, ideological or other elected purposes." The repercussions of such a holding were discussed by Judge Kozinski in his dissenting opinion in *Grunwald v. San Bernardino School Dist.*, *supra* at 1230:

Precedent joins common sense. The Supreme Court in *Chicago Teacher's Union, Local No. 1 v. Hudson*, \* \* \* listed three – and only three – requirements a union must meet in a situation such as this. First, none of the money collected from the objectors may be used – even temporarily – for nonrepresentational purposes. Citing *Abood v. Detroit Board of Education* \* \* \*, the

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<sup>11</sup> See *Leathers v. Medlock*, 59 U.S.L.W. 4281 (U.S. 1991); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune v. Minn. Com'r of Rev.*, 460 U.S. 575 (1983). In *Abood* and *Hudson* this Court noted that "requiring nonunion employees to support their collective-bargaining representative 'has an impact upon their First Amendment interests' ". *Hudson* at U.S. 301. The Court's concern was presumably with the forced *association*, not the fact of revenue *collection*.

Court decried the "tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" 475 U.S. at 305, 106 S.Ct. at 1075. Here, the Union uses not a penny for nonrepresentational activities as 100% of the agency fee is safely tucked away in escrow. Thus, objecting employees do not suffer the injustice of having their money used to advance causes they abhor.

The only other first amendment harm plaintiffs suggest is that the \$8 a month is not available to *them* for three (or seven months), so they are unable to use the money to exercise *their* first amendment rights. \* \* \* If this argument were accepted, every suit for money against a party acting under color of governmental authority would automatically become a first amendment case. In any event, it is a type of harm that the Court in *Hudson* did not recognize.

[emphasis by Court]

**II. THE REQUIREMENT THAT A PERSON OBJECTING TO THE USE OF COMPULSORY DUES INDICATE WHICH USES HE OR SHE BELIEVES ARE NONCHARGEABLE IS CONSTITUTIONAL, PROVIDED THAT THE OBJECTOR IS NOT REQUIRED TO DISCLOSE HIS OR HER PERSONAL POSITION REGARDING AN ISSUE**

This Court has consistently adhered to the proposition that, while an organization collecting compulsory dues has the ultimate burden of proving that such dues are used for constitutionally chargeable purposes, the dues payer carries the initial "burden of raising an objection." *Chicago Teachers Union, Local No. 1 v. Hudson*, *supra*

at 306; *Abood v. Detroit Board of Education*, *supra*; *Machinists v. Street*, 367 U.S. 740 (1961). Petitioner argues, however, that the type of objection required by Florida Bar rules is constitutionally impermissible.

Florida Bar rules require that the Bar publish notice of adoption of legislative positions in *The Florida Bar News*, a twice-monthly official publication of the Bar, immediately following the board meeting at which the positions are adopted.<sup>12</sup> A member then has 45 days after the date of publication in which to file an objection. Upon receipt of an objection, 100% of the member's pro rata share of the entire legislative budget is immediately placed in an interest bearing escrow account. Petitioner complains that the procedure is defective for two reasons.

First, petitioner argues that the procedure is unduly burdensome because it requires him to monitor *The Florida Bar News* on a continuing basis and to file a separate objection as to each position. The fallacy of the argument is that the rule places no greater monitoring burden upon the petitioner than he would have if he were permitted to make a general objection. Unless the petitioner were willing to grant to the Bar the unilateral right to determine which issues are within the chargeable scope of compulsory dues use and which are not (an unlikely probability), the petitioner would still have to monitor all positions subsequently taken to decide whether he agrees with the Bar's determination.

<sup>12</sup> Petition for Writ of Certiorari, App. 6a.

Petitioner argues that the Bar cannot require more than "a standing objection to all nonchargeable exactions".<sup>13</sup> Just as with the advance reduction, such an objection would be unworkable in actual application. The petitioner's demand for a standing general objection presumes that there is a concrete standard against which all uses can be easily judged as chargeable and nonchargeable, and that exercise of the Bar's responsibility is a simple matter of properly designating each use according to that standard. This Court's opinion in *Keller v. State Bar of California*, supra, and its own experience in *Lehnert v. Ferris*, 1991 U.S. Lexis 3017 (1991), illustrate that there is no concrete standard. In *Keller* the Court noted that some activities will fall at the "extreme ends of the spectrum" and be easily identifiable as germane or non-germane, but that the proper categorization of others "will not always be easy to discern." *Id.* at L.Ed.2d 15. In *Lehnert* the Court expressed divergent views as to the appropriate test for determining whether an expenditure is or is not germane and as to the proper classification of particular expenditures. Particularly in the legislative arena, most issues are likely to fall between "the extreme ends of the spectrum" where men and women of good faith can fairly differ.

Again, the circumstances giving rise to this case are illustrative. The petitioner challenged the Bar's announced intention to take a position on a proposed amendment to the Florida Constitution which would

<sup>13</sup> Brief of Petitioner, p. 19.

have several limited the State's ability to raise revenue.<sup>14</sup> If the Bar had limited its activities to informing the public of the impact which the amendment would have had on the functioning of the judicial process, would such activity been germane to the State's interest in "improving the quality of legal services"? *Keller v. State Bar of California*, supra at L.Ed.2d 14. The obligation of a member to designate which activities or issues he or she believes to be nonchargeable is a reasonable requirement which sets in motion the mechanism to fairly resolve the question.

The only alternative to the Bar's current objection procedure would be to permit an objector such as the petitioner to file a single nonspecific objection which would automatically impose upon the Bar the alternative of either rebating 100% of the objector's pro rata share, regardless of the merit of the objection (an unfair result for other dues paying members), or sending every issue to costly arbitration. This is apparently the procedure which the petitioner seeks when he refers to "a standing objection to all nonchargeable exactions."

Petitioner asserts that the foregoing argument by the Bar is "disingenuous" because the petitioner has the ability to place the Bar in the same position under the current rules simply by filing an objection to every position. This, the petitioner concludes, shows that the Bar's preference for specific objections "can only be for the purpose of

<sup>14</sup> See *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984).



discouraging dissent.”<sup>15</sup> In fact, the Bar is motivated by an entirely different and completely legitimate consideration. Florida Bar rules allow the Bar to elect either to rebate an appropriate pro rata share of a dissenting member’s dues or to send the issue to arbitration. Knowing how many members have objected to a particular position provides the Bar with the information necessary to rationally judge whether arbitration is economically or ideologically justified.<sup>16</sup>

The context in which petitioner discusses the Bar’s motivation is ironic. Neither the Bar nor this Court has reason for concern over a member who is going to object to every position, regardless of the member’s true belief in the merit of such objection, solely for the purpose of forcing the Bar to return dues or go to arbitration. Rules should not be written to accommodate those who would act in bad faith. For the purpose of formulating such rules, it should be presumed that a member would object only to those positions which the member honestly believes in good faith constitute nonchargeable uses.

There is an additional reason for the Bar’s procedure which is directly related to the underlying purpose for its existence. The procedure is intended to protect members

<sup>15</sup> Brief of Petitioner, p.20.

<sup>16</sup> The Bar has thus far elected to rebate 100% of pro rata shares to objecting members because the minutely small percentage of members filing objections on each issue indicated that there was not a strong ideological dispute and arbitration would have been an unnecessary expense. In the case of the positions cited by amicus curiae Frankel and Little, for example, only 9 members out of 45,166 (.019%) filed objections. [Brief of Amicus Curiae Frankel & Little, App., p. 38a]

from the imposition on their First Amendment rights that would be occasioned by the compelled financial support of political or ideological ideas with which they may disagree. Even though a member believes that a particular expenditure is nonchargeable, he or she may elect to voluntarily support the position and, consequently, not object. If, after reasonable notice to all members of a particular use of dues, no objections are filed, the Bar may reasonably presume that the use does not politically or ideologically offend any members and does fairly reflect the consensus of the membership.

Petitioner’s second contention regarding the objection procedure is that the requirement for a specific objection forces him to disclose “his own position concerning the legislative policy at issue” contrary to the dictates of *Abood*. In support of this position, amicus curiae Pacific Legal Foundation cites the line of cases commencing with *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958) which hold that the First Amendment protects against compelled disclosure of political associations. The anonymous association cases are not analogous to the case at bar. Disclosure of affiliation with a political or ideological organization necessarily discloses a person’s beliefs. The Florida Bar rule, on the other hand, does not require the objector to disclose his or her position regarding a particular issue, only a belief that the issue is outside the scope of chargeable use of compulsory dues. Such an objection does not disclose a person’s “political or ideological opinion” and is no more likely to engender animosity than a single standing

objection.<sup>17</sup> It was recognition of this important distinction which led the Eleventh Circuit to reject petitioner's argument:

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." \* \* \* This burden "is simply the obligation to make his objection known." \* \* \* The affirmative objection requirement here is within the scope of this obligation. It merely requires the objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue. We therefore reject Gibson's challenge on this point.

*Gibson v. The Florida Bar*, 906 F.2d 624, 632 (11th Cir. 1990).<sup>18</sup>

If this Court intended to mandate the type of generalized, continuing objection envisioned by the petitioner, there would have been no reason for the requirement that the Bar provide members with reasonably detailed information regarding the breakdown of expenditures prior to the member having to file an objection. Such a requirement is implicitly based upon the assumption that the

<sup>17</sup> As noted, a member may believe that a particular expenditure is nonchargeable and nevertheless choose to voluntarily support the activity and not object. Conversely, the filing of an objection does not signal the member's ideological position on an issue since some members may object to the use of dues for nonchargeable purposes regardless of whether or not they agree with the position.

<sup>18</sup> Petition for Certiorari, App. 15a.

member requires the information in order to make a rational decision regarding objection on an issue-by-issue basis. Since the Bar carries the burden of proof after an objection is made, there would be no reason to require provision of detailed information *before* a general standing objection.

This case does not involve protection of the petitioner's constitutional rights. Those rights have been adequately protected since this Court's decisions in *Ellis*, *Hudson*, and *Keller*. The relief which petitioners now seek would trivialize the significant rights defined in those cases by elevating individual convenience to a fundamental right.

### III. THE FLORIDA BAR'S PROCEDURES FOR PROVISION OF INFORMATION REGARDING USE OF COMPULSORY DUES MEET CONSTITUTIONAL STANDARDS

Petitioner and amicus each make reference to alleged inadequacies in the Bar's notice and identification of dues expenditures. Such allegations are based on *Hudson's* discussion that, for purposes of collecting proportionate share payments via a union's advance reduction/payroll deduction scheme, potential objectors be given sufficient information to gauge the propriety and sources of any agency fee calculation. Further, the union in *Hudson* had not provided nonmembers with a complete breakdown of all expenditures; only a recitation of expenditures not chargeable to nonmembers' dues was provided. Nevertheless, even in the context of *Hudson's* periodic payroll deduction scheme, this Court noted:

The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

*Chicago Teachers' Union, Local No. 1 v. Hudson*, 106 S.Ct. 1066 at 1076 n. 18. In contrast, The Florida Bar collects its annual member dues in one payment, based on a budget formulated through an open and participatory process. The proposed budget and each successive draft is published for the entire membership and meetings of the budget committee are fully noticed to the member ship.<sup>19</sup>

This Court, in *Keller*, acknowledged the difficulty in categorizing matters as either within or outside the constitutional purview for compulsory dues funding:

Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy discern.

*Keller v. State Bar of California*, supra at 2237. With an appreciation of the difficulty in precisely discerning "where the line falls" within various legislative matters – and following the admonition of our parent court to avoid

<sup>19</sup> Rules relating to budgeting procedures were adopted as an opinion of the Florida Supreme Court. *The Florida Bar re Rules Regulating The Florida Bar*, 949 So. 2d 977 (Fla. 1986). See Rules 1-7.1, 2-6.1 through 2-6.12.

divisive issues<sup>20</sup> – The Florida Bar's procedures call for the formal notice of all legislative positions taken by it in order to totally accommodate member dissent. As soon as the Bar's formal legislative program takes shape, the entire membership is immediately apprised of all there is to know about it ideologically and financially. Such information is prominently featured – as an official Bar notice and precisely quantified as to its dues impact – in *The Florida Bar News*.

All Bar finances are audited by an independent accounting firm. The Bar calculates each member's pro rata share of the financial support of legislative activities, in their entirety. The complete legislative function is deemed to be funded exclusively by member dues in order to vitiate any questions about the integrity of this calculation. The cost per member of the Bar's full legislative program is published in the annual directory issue of *The Florida Bar Journal* and provided to every member as a potential maximum dues reimbursement figure.

Following the formal year-end audit of Bar activities by a certified public accountant, the independently verified portion of Bar dues attributable to any contested legislative activity – not some amount of arguable accuracy based on prior experience – is rebated to all dissenting members, together with interest from the date received, calculated at the statutory rate on judgments.

The Florida Bar does not, as did the union in *Hudson*, leave the membership "in the dark about the source of

<sup>20</sup> *The Florida Bar re Schwarz*, 552 So.2d 1094, 1097 (Fla. 1989).



the figure" for dues, and does not, as did the union, require members to object in order to receive information. Finally, unlike the union in *Hudson*, the Bar does not limit the membership to information about admittedly non-chargeable expenditures. The Bar provides its members with full information on *all* budgeted expenditures. Petitioner complains that the information is nevertheless inadequate because it does not classify the budgeted amounts as chargeable and nonchargeable and does not provide the percentage of dues apportioned to each. The procedure called for is just as problematic as advance reduction. The Bar could be compelled to force its budget into an artificial mold in which it assigns fictitious percentages to various categories, but what purpose would be served? A member now has sufficient information to formulate an opinion as to whether the Bar is properly using his or her dues, and those dues are fully protected until final resolution in the event of an objection.

Petitioner asks this Court to bind all organizations which utilize compulsory dues or agency fees in a procedural straight jacket. There is nothing constitutionally sacrosanct about advance reduction. This Court should permit sufficient leeway for organizations to develop procedures which sensibly meet their particular circumstances while meeting constitutional standards.

#### IV. THERE IS NO RECORD UPON WHICH THIS COURT CAN DETERMINE WHETHER OR NOT THE PETITIONER IS ENTITLED TO A REFUND

The petitioner asserts that the Circuit Court erred in failing to order a refund of an appropriate portion of dues payments made by petitioner. The lower court was

correct in declining to order a refund and this Court should do the same because, regardless of this Court's holding, the record from the trial court is insufficient to establish whether or not the petitioner is entitled to a refund.

The petitioner challenged the use of his dues in connection with a proposed amendment to the Florida Constitution in 1984. No judicial determination was ever made of the amount of dues, if any, spent on the issues or the pro rata share of petitioner's dues which such expenditures would have accounted for.<sup>21</sup> In addition, no determination has ever been made by the trial court or any impartial decisionmaker whether or not the use of dues in connection with the proposed amendment was germane to the Bar's constitutionally justified purpose and therefore chargeable. Even if this Court were to rule against the Bar, it would be necessary to remand to the trial court for determination of those issues.

The Eleventh Circuit declined to reach the issue of retroactive damages in the form of a refund because petitioner did not request such damages in his complaint or present any evidence related to it at trial or on remand. Petitioner responds that after making his objection, the burden of proof shifted to the Bar, that past decisions of

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<sup>21</sup> In its first opinion in this case, the Eleventh Circuit noted testimony that "each lawyer's share of the lobbying budget amounts to approximately \$1.50." Petition for Writ of Certiorari, p. 34a. No finding was ever made by the trial court respecting the amount and, in any case, the \$1.50 figure represented the petitioner's pro rata share of the *entire* legislative budget, not the amount allocated to the proposed amendment, the only issue which he challenged.

this Court indicate that a general claim for relief is sufficient to support a refund, and that he tried to raise the issue several times at the trial level. Petitioner misses the point.

This Court has indicated that a general claim is sufficient and consequently the Bar would not suggest that petitioner has waived his right to claim a refund simply because it was not specified in the ad damnum clause of his complaint. However, petitioner has an obligation to raise the issue at some appropriate point in the trial court so that respondents have a fair opportunity to raise available defenses, such as qualified immunity, and so that an evidentiary record can be created. The petitioner did mention the issue of damages on several occasions in the trial court, but never under circumstances calling for a response by the Bar or specific action by the trial court. The point is that he may be entitled to have the question heard, but not at the appellate level.

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◆

### CONCLUSION

The Florida Bar respectfully urges that the decision of the Eleventh Circuit be affirmed.

Respectfully submitted,

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JUL 11 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**REPLY BRIEF FOR THE PETITIONER**

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## ARGUMENT

### I. BECAUSE COLLECTING COMPULSORY BAR DUES COMPELS ASSOCIATION AND TAKES PROPERTY, ADVANCE REDUCTION TO EXCLUDE UNDENIABLY NONCHARGEABLE AMOUNTS IS REQUIRED BY FIRST-AMENDMENT DUE PROCESS

Two courts of appeals have held "that advance reductions of agency shop fees are required by [*Teachers Local 1 v. Hudson*] [475 U.S. 292 (1986)], even where the agency fee procedure includes an escrow of 100% of the collected agency fees." *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir. 1990) (2-1 decision); *accord Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987). A third court of appeals also has interpreted *Hudson* as requiring an advance reduction, as the Brief for Respondents at 6 n.3 concedes. See *Dashiell v. Montgomery County*, 925 F.2d 750, 754, 756 (4th Cir. 1991).<sup>1</sup> Nonetheless, respondent Florida Bar and its amici National Education Association, *et al.* ("NEA"), argue that "[n]owhere in [*Hudson*] is there a requirement for an escrow and an advance reduction." Respondents' Brief at 5; *accord* NEA's Brief at 7.

The Bar acknowledges, Respondents' Brief at 4, as it must, that *Hudson*, 475 U.S. at 309 (emphasis added), said that the "appropriately justified *advance reduction* \* \* \* [*is*] *necessary* to minimize both the impingement [of the agency shop on employees' first-amendment interests] and the burden" of objection. The Bar and NEA misread that clear holding as saying only that nonmembers must be provided adequate information. Respondents' Brief at 4-5; NEA's Brief at 7-8. However,

<sup>1</sup> See also *In re Chapman*, 128 N.H. 24, 40, 509 A.2d 753, 764-65 (1986) (Souter, J., concurring) (citing *Hudson* for the proposition that one way to avoid the violation of first-amendment rights caused by use of compulsory bar dues for lobbying "would be to require the Association to provide a mechanism for a *reduction in dues* reflecting the extent to which the lobbying is not germane or reasonably related to those responsibilities approved in *Lathrop v. Donohue*, 367 U.S. 820 (1961)) (emphasis added).

"advance reduction," not "appropriate justification," is the *subject* of the Court's sentence. As did the courts of appeals in *Grunwald*, *Damiano*, and *Tierney*, petitioner presumes that this Court means what it says.

Moreover, advance reduction is essential to fulfillment of the principles on which *Hudson* rests. The Bar and NEA argue that only spending of compulsory dues and fees, not collection, gives rise to constitutional concerns. Respondents' Brief at 12-13; NEA's Brief at 8-9. They thus ignore two teachings of *Hudson*.

First, although "a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," additional procedural safeguards "are required because *the agency shop itself* impinges on the nonunion employees' First Amendment interests." *Hudson*, 475 U.S. at 309 (emphasis added). But, if the agency shop impinges on first-amendment rights even with no risk of improper spending, then not only spending constitutes the infringement, but also collection. Consequently, *Hudson*, 475 U.S. at 310 (emphasis added), enunciated "constitutional requirements for the Union's *collection* of agency fees," not just "a way of preventing compulsory subsidization of ideological activity," *id.* at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)).

The Brief for Petitioner at 12-13 notes that "a likely consequence of the compelled financial exaction" was identified in *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion), and other cases as the inability of the individual to use those funds for his own causes. See *Rutan v. Republican Party*, 110 S. Ct. 2729, 2734 (1990). Twisting that ancillary point, the Bar and NEA disingenuously suggest that petitioner argues that "any excessive collection of money" under color of law "gives rise to a First Amendment claim." NEA's Brief at 11-12; accord Respondents' Brief at 13-14. That is *not* petitioner's contention.

The taking of property to pay civil damages or taxes, or serve other governmental purposes "having nothing to do with" first-amendment conduct at all, as in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-07 (1986), cited in the NEA's Brief at 11, does not give rise to a first-amendment claim simply because it "will have

some effect on the First Amendment activities of those subject to" the taking. However, that is not this case.

Here, the taking of property gives rise to a first-amendment claim *because the taking serves goals that themselves infringe upon first-amendment freedoms*, as in *Elrod*, *Abood*, *Hudson*, and *Keller v. State Bar*, 110 S. Ct. 2228 (1990). The first-amendment infringement inherent in the taking in these cases is forced association with a political party, union, or professional organization through the coerced collection of party contributions, agency fees, or bar dues. See *Keller*, 110 S. Ct. at 2236; *Hudson*, 475 U.S. at 301-02 & nn.8-9; *Elrod*, 347 U.S. at 355.<sup>2</sup> The inability of the individual to use those funds for his or her own expressive and associational purposes is an *additional* effect of the forced association recognized in *Elrod*, 427 U.S. at 355-56, and the other cases cited in Petitioner's Brief at 12-13. See Yelin, *Constitutional Considerations Affecting the Methods of Exacting Union "Fair Share" Collective Bargaining Fees from Non-Member Public Employees*, 1985 Det. C.L. Rev. 767, 790-91.

When free association is infringed, even if only partially, as by the contribution limitations in *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976), the infringement may be sustained only "if the State demonstrates a sufficiently important interest and employs means *closely drawn* to avoid *unnecessary* abridgment of associational freedoms." *Id.* at 25 (emphasis added). In *Abood*, *Hudson*, and *Keller*, the Court found such a state interest, but only to the extent that compulsory fees are limited to the costs of certain functions of a union or integrated bar *and* are collected with certain "carefully tailored" procedural safeguards. *Hudson*, 475 U.S. at 302-03; see *Keller*, 110 S. Ct. at 2236-37.

"Careful" or "narrow tailoring" does not "require elimination of *all* less restrictive alternatives." *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989) (emphasis added). However, it does "require the government goal to be substantial, and the cost to

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<sup>2</sup> "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment); see *Buckley v. Valeo*, 424 U.S. 1, 91 & n.124 (1976).



be *carefully* calculated. Moreover, since the State bears the burden of justifying its restrictions, it must *affirmatively establish* the reasonable fit" between the restrictions and the state's objective. *Id.* at 480 (emphasis added) (citation omitted).

*Second*, in "this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. The Bar ignores this fact; the NEA dismisses it lightly, *see* NEA's Brief at 12 & n.10. However, even if the deprivation is only temporary, "[d]etermining the adequacy of predeprivation procedures requires consideration of the Government's interest in imposing the temporary deprivation, the private interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures, and the probable value of additional or substitute procedural safeguards." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (plurality opinion).

Escrow without advance reduction satisfies neither first-amendment careful tailoring nor the due-process test, particularly in this case. There "are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" *Hudson*, 475 U.S. at 307 n.18 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)) (emphasis added). Nonetheless, *some* meaningful degree of "[p]recision \* \* \* must be the touchstone" in the First Amendment context." *Id.* at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Collection of monies that indisputably will not be used for lawfully chargeable activities, even if escrowed and later rebated, is inherently *imprecise*. It thus violates the first amendment, because it is a means "substantially broader than necessary to achieve the government's interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), in seeing that all attorneys or employees subsidize only chargeable activities.<sup>3</sup>

<sup>3</sup> The NEA's Brief at 12 & n.9, 21-22, citing *Ward*, argues that collecting more money does not "substantially" increase the infringement upon associational freedom. *Ward*, 491 U.S. at 801-02, equates "substantial" with "material." Coerced payment of monies to which a bar or union is *not* entitled, regardless of

Collection of nonchargeable amounts also denies due process. It presents a *certainty* of erroneous deprivation. And it adversely affects the individual's interests, not just in having more money, as the NEA's Brief at 13 n.10 says, but also in not associating with a bar or union more than necessary to serve the state's interest in mandatory association and in "us[ing h]is property for his own preferred political, ideological or other elected purposes." *Damiano*, 830 F.2d at 1370.

Moreover, in this case, the lack of advance reduction and pre-collection notice "inevitably" permits the Bar to *spend* a dissenting attorney's dues on constitutionally nonchargeable purposes before any funds are escrowed, as Respondents' Brief at 11 concedes. *See* Petitioner's Brief at 21-22. Indeed, under the plan approved by the lower courts in this case, that deficiency exists throughout the fiscal year, because the Bar escrows *only* "the pro rata amount of the objecting member's dues at issue" under "a written objection to a particular position on a legislative issue." Petition Appendix ("P.A.") 6a n.8.<sup>4</sup>

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the amount, is a materially greater infringement on the individual's associational freedom than payment of monies to which the organization is arguably entitled.

<sup>4</sup> Respondents' Brief at 4 (footnote omitted) asserts, without record support, that in "administering its rule, the Bar makes a 100% escrow of each dissenting member's pro rate [*sic*] share of the entire legislative budget." As in *Hudson*, 475 U.S. at 305 n.14, this Court should "consider the procedure as it was presented to the District Court." Here, there is a particularly acute "fear that a defendant would be 'free to return to his old ways'" which "dictate[s] that [the Court] review the legality of the practice defended before the District Court," *id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). The Bar apparently has escrowed an objector's pro rata portion of its entire legislative program only "[p]ending implementation of a method to specifically allocate costs attributable to each legislative position." Letter from John F. Harkness, Jr., Executive Director, Florida Bar, to David P. Frankel (May 24, 1989) (Frankel *Amici* Brief 54a-55a); *see Official Notice*, The Florida Bar News, Oct. 15, 1990, at 4 (Frankel *Amici* Brief 19a). The Bar's amended rule promulgated on March 26, 1991, still provides for escrow of *only* "the pro rata amount of the objecting member's dues at issue" under "a written objection to a particular position on a legislative issue." Frankel *Amici* Brief 61a-62a. [cont'd]



The Bar argues that this "problem would exist as well with an advance reduction," because it might make unanticipated nonchargeable expenditures. Respondents' Brief at 11. However, that advance reduction might prevent only most impermissible spending is no reason to dispense with the reduction and permit even greater, irreparable invasion of first-amendment rights. Nor is payment of interest on rebates a constitutionally adequate alternative, as the Bar and NEA urge, Respondents' Brief at 11-12; NEA's Brief at 18 n.15. The harm is only reduced, not cured, by interest. *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984).

Advance reduction does not restrict the organization's ability to require everyone to contribute to lawfully chargeable costs, as the Bar and NEA ritualistically assert, because only non-chargeable costs are excluded by the reduction. The sole rationalization the Bar and NEA advance for not providing an advance reduction is that it imposes administrative and financial burdens on them. Respondents' Brief at 6-11; NEA's Brief at 13 n.10.<sup>5</sup> However, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of

Moreover, even escrow of a pro rata portion of the entire legislative program is unlikely to avoid impermissible spending. As the Respondents' Brief at 4 n.2 concedes, the Bar's "Abroad obligations are not limited to legislative expenditures." The Bar misrepresents the record in asserting that petitioner's claims in this action are limited to legislative expenditures. See *infra* p. 18.

<sup>5</sup> The Bar and its *amici* accuse petitioner and other dissenting individuals, and their counsel, of acting "in bad faith" and seeking "to bind all organizations which utilize compulsory dues or agency fees in a procedural straight jacket" in urging the courts to require advance reduction and the other procedural safeguards at issue in this case. Respondents' Brief at 18, 21, 24; see NEA's Brief at 23-24; Brief of Wisconsin Bar at 13. Those *ad hominem* attacks are inappropriate and unprofessional: "the exercise \* \* \* of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious." *NAACP v. Button*, 371 U.S. at 440 (emphasis added). Do the Bar and its *amici* think that the federal courts which have applied *Hudson* to require advance reduction and advance notice, and permit general objections, did so only to "hamstring" unions and bar associations?

law," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); "[n]or is additional expense occasioned by [meeting the ordinary standards of due process] sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Therefore, "the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops [or attorneys] regardless of whether the union [or bar] believes them to be excessively costly." *Andrews v. Education Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987); accord *Lowary v. Lexington Local Bd.*, 903 F.2d 422, 431 (6th Cir.), cert. denied, 111 S. Ct. 385 (1990).

In any event, the burdens conjured up by the Bar and its *amici* are spurious. *Hudson*, 475 U.S. at 307 n.18, contemplates calculation and pre-collection notice of an advance reduction based on "expenses during the preceding year." The Bar concedes that "is workable with an organization that has a stable relative allocation of funds between chargeable and nonchargeable uses from year to year." But it claims that it cannot do so, "since the apportionment of The Florida Bar's -budget one year affords no predictability as to future years." Respondents' Brief at 9. In fact, the portions of the Bar's budget spent on line items likely to contain nonchargeable expenses are relatively stable from year to year.<sup>6</sup>

Certainly, the Bar's spending fluctuates no more significantly than a union's, since the allocation of a union's expenses depends upon the political and contract-negotiation cycles, as well as the "exigencies of the legislative process" on which Respondents'

<sup>6</sup> Selected programs as a percentage of dues as reported in *The Florida Bar Journal*, Sept. 1986, at 29-30, Sept. 1987, at 36-37, Sept. 1988, at 29-30, Sept. 1989, at 30-31, Sept. 1990, at 26-27:

Program	1986-87	1987-88	1988-89	1989-90	1990-91
Journal & News	4.5%	3.8%	0.9%	3.6%	3.6%
Public Information	5.9%	7.4%	7.2%	7.4%	6.6%
Public Interest					
Programs	4.9%	4.7%	4.9%	4.5%	3.9%
Legislation	4.2%	5.4%	4.5%	5.4%	4.4%
TOTAL	19.5%	21.3%	17.5%	20.9%	18.5%

Brief at 11 relies.<sup>7</sup> While recognizing that "the proportion of the union budget devoted to political activities may not be constant," this Court has held, since *Allen*, 373 U.S. at 122-23 & n.8 (emphasis added), that a dissenting nonmember is "entitled" to "a reduction of future \* \* \* exactions from him by the same proportion" that nonchargeable expenses bear to total expenses. *Hudson*, 475 U.S. at 307 n.18, suggests that the most practical and fairest way of calculating that amount is on the basis of the prior year's expenditures.<sup>8</sup> Since *Hudson*, several unions have implemented such an advance reduction with no apparent undue burden. See, e.g., *Andrews*, 829 F.2d at 337-38 (2d Cir. 1987); *Jibson v. Michigan Educ. Ass'n*, 719 F. Supp. 603, 606 (W.D. Mich. 1989); *Cramer v. Matish (UAW)*, 705 F. Supp. 1234, 1236-37 & n.6 (W.D. Mich. 1988), *modified on other grounds*, 924 F.2d 1057 (6th Cir. 1990) (table); *Hohe v. Casey (AFSCME)*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989).<sup>9</sup>

<sup>7</sup> The Court can take judicial notice that most elections occur in a two- or four-year cycle. A recent survey found that 80% of collective-bargaining contracts have three-year terms, and 9% have two-year terms. Bureau of Nat'l Affairs, *Basic Patterns in Union Contracts* 1 (12th ed. 1989).

<sup>8</sup> Fluctuations in expense patterns are likely to average themselves out over a period of years. *Allen*, 373 U.S. at 123 n.8, and *Keller*, 110 S. Ct. at 2237, suggest that an advance reduction might be based on a projected budget. However, that would be a less reliable way to avoid the risk of excessive collection and impermissible spending, because nothing prevents a bar or union from overstating its projected chargeable expenditures out of self-interest.

<sup>9</sup> Advance reduction does not impose a peculiar undue burden on teachers' unions, as the dissent in *Grunwald*, 917 F.2d at 1232 & n.4, assumed. At least three NEA state affiliates have implemented plans under which pre-collection notice of a reduced fee is given to all nonmembers after the school year begins. See *Andrews*, 829 F.2d at 337-38; *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1490, 1496-97 (W.D. Mich.), *aff'd*, 893 F.2d 335 (6th Cir. 1989), *cert. denied sub nom. Lindsey v. Ferris Faculty Ass'n*, 110 S. Ct. 2586 (1990); *Lowary v. Lexington Local Bd.*, 704 F. Supp. 1456, 1474-75 (N.D. Ohio 1988), *modified on other grounds*, 903 F.2d 422 (6th Cir.), *cert. denied*, 111 S. Ct. 385 (1990).

## II. ADVANCE NOTICE EXPLAINING THE BASIS FOR THE CHARGEABLE SHARE IS REQUIRED TO FACILITATE OBJECTIONS AND ENSURE DUE PROCESS, EVEN IF THE ENTIRE FEE IS ESCROWED

*Hudson*, 475 U.S. at 306 (emphasis added), held a union's procedure constitutionally "inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share" of dues that they were required to pay. Revealingly, the Bar does not argue that it provides attorneys with any information about the basis for the proportionate share of dues that they are required to pay if they object to subsidizing more than the Bar's costs of "regulating the legal profession and improving the quality of legal services," *Keller*, 110 S. Ct. at 2236. Instead, the Bar asserts that it "does not \* \* \* leave the membership 'in the dark about the source of the figure' for dues." Respondents' Brief at 23-24 (emphasis added).

However, *Hudson* requires disclosure of relevant, not irrelevant, financial information. The data needed by "potential objectors"—and the disclosure mandated by *Hudson*, 475 U.S. at 306-07—is information "identifying the expenditures for [activities] \* \* \* for which [objectors] can fairly be charged a fee" under the first amendment. Here, to decide intelligently whether they wish to object, attorneys need an identification of the expenditures that the Bar considers constitutionally chargeable under *Keller*. The Bar need not disclose "an exhaustive and detailed list of all its expenditures," *Hudson*, 475 U.S. at 307 n.18; but its disclosure nevertheless must be "sufficient to satisfy the First Amendment concerns in this context." *Id.* at 306 n.17. Neither of the ways in which the Bar argues that it meets those concerns is sufficient under *Hudson* and *Keller*.

The Bar first claims that "the formal notice of all legislative positions taken by it" apprises members "of all there is to know about it ideologically and financially." Respondents' Brief at 23. However, under the Bar's procedure, it gives only "notice of adoption of legislative positions in The Florida Bar News." The Bar does not determine the pro rata amount of dues allocable to those positions, or whether it will treat them as chargeable or



not, unless and until *after* a member objects. P.A. 6a n.8.<sup>10</sup> The Bar cites no record reference supporting its claim that the notice provides financial information; in fact the notice does not. See Frankel *Amici* Brief 17a-19a. Thus, the Bar's scheme, both on its face and as applied, is contrary to the holding of *Hudson*, 475 U.S. at 306, that "requiring [potential objectors] to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*."

The Bar also argues that it "provides its members with full information on *all* budgeted expenditures." Respondents' Brief at 24. However, the budget categories disclosed are too broad to be useful. See Joint Appendix ("J.A.") 62. The Bar admits that "[n]one of these categories is a nonchargeable use per se." Respondents' Brief at 7. Thus, the Bar concedes that many of its budget categories include *both* chargeable and nonchargeable expenses, and that "it does not classify the budgeted amounts as chargeable and nonchargeable and does not provide the percentage of dues apportioned to each." *Id.* at 24; *see id.* at 4 n.2. But precisely that classification is required by *Hudson*, 475 U.S. at 307 n.18 (emphasis added) (cross-reference omitted):

With respect to an item *such as* the Union's payment \* \* \* to its affiliated state and national labor organizations, *for instance*, either a *showing that none* of it was used to subsidize activities for which nonmembers may not be charged, or an *explanation of the share that was so used* was surely required.

With the exception of the panel majority below, the federal courts have uniformly applied *Hudson* as holding that, "in its initial explanation to nonunion employees, the union must break its expenses into major descriptive categories and *disclose those categories or portions thereof which it is including in the fee to be charged.*" *Dashiell*, 925 F.2d at 756 (emphasis added); *see, e.g., Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620,

<sup>10</sup> As that is the scheme the lower courts approved in this case, P.A. 8a, this Court should review its constitutionality in that form. *See supra* p. 5 note 4.

634-35 & n.22 (1st Cir. 1990), *petitions for cert. filed on other grounds*, 59 U.S.L.W. 3674, 3754 (U.S. Mar. 20, Apr. 25, 1991) (Nos. 90-1470, -1651); *Tierney*, 824 F.2d at 1504.<sup>11</sup>

Moreover, the NEA's Brief at 15 n.12 (quoting *Hudson*, 475 U.S. at 306-07), is wrong in arguing that the "only 'explanation' required by *Hudson* is an 'identif[ication]' of the major categories of expenditures that the union views as chargeable or nonchargeable." *Hudson*, 475 U.S. at 307 & n.18 (emphasis added), also mandates "adequate disclosure of *the reasons why* [potential objectors are] required to pay their share." Merely disclosing that, for example, the Bar considers chargeable a percentage of its expenditures for "Legislation" would not tell the member which *kinds* of legislation the Bar views as "germane" to "regulating the legal profession and improving the quality of legal services," *Keller*, 110 S. Ct. at 2236. That too must be explained.

The Bar argues that "the difficulty in categorizing matters as either within or outside the constitutional purview for compulsory dues funding" justifies its failure to provide advance notice of

<sup>11</sup> *Hudson*, 475 U.S. at 307 n.18, also held that "adequate disclosure surely would include \* \* \* verification by an independent auditor." *See id.* at 310. The NEA's Brief at 15 n.12 cites cases holding that "the role of the independent auditor under *Hudson* is *not* to make the legal determination of whether particular expenditures are or are not legally chargeable." However, those cases do not hold that the identification of chargeable and nonchargeable expenses need not be independently verified *in any sense*, as the NEA implies, and Respondents' Brief at 23 assumes. "The verification requirement compels the union to have an independent auditor determine whether the amounts claimed by the union *for chargeable activities* are true." *Dashiell*, 925 F.2d at 756 (emphasis added). This requirement is not satisfied by audits of regular financial statements which do not allocate expenses as chargeable or not. *Mitchell v. Los Angeles Unified School Dist.*, 744 F. Supp. 938, 940-41 (C.D. Cal. 1990); *Hohe v. Casey*, 727 F. Supp. 163, 165-67 (M.D. Pa. 1989). An audit of such an allocation does not require the auditor to make legal determinations. *Muchell*, 744 F. Supp. at 941 n.4. Because the Bar discloses absolutely no independent verification of chargeable expenses, and because the record is devoid of evidence on the issue of what accountants can or must do in conducting an audit, the Court need not here address the scope of an auditor's role in providing the independent verification of chargeable expenses required by *Hudson*.



which expenditures it considers chargeable. Respondents' Brief at 22-23; *see id.* at 10. That same "difficulty" existed for public-employee unions when *Hudson* was decided. *See Abood*, 431 U.S. at 236-37. Nonetheless, *Hudson*, 475 U.S. at 306 & n.17, held that making and disclosing the initial categorization "does not impose an undue burden on the union," because "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake," dictate that the union, not the individual, bear that burden. And, *Keller* found unpersuasive the contention that undertaking an "'Ellis analysis'" to determine which expenditures are chargeable and giving the explanation required by *Hudson*, in addition to preparing a regular budget, "'would create 'an extraordinary burden' for the bar \* \* \*.'" Any "'additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 110 S. Ct. at 2237 (quoting with approval *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 255 Cal. Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., dissenting)).

Adequate notice entails timeliness as well as sufficient information. Every court of appeals, other than the panel majority in this case, that has addressed the issue has held not only that a union or bar must shoulder the "burden" of giving the notice required by *Hudson* to all individuals paying compulsory fees, but also that the notice "must be given \* \* \* before any fees may be collected." *Grunwald*, 917 F.2d at 1228; *accord Dashiell*, 925 F.2d at 754; *Dean v. TWA*, 924 F.2d 805, 808 (9th Cir. 1991); *Tierney*, 824 F.2d at 1503; *see Schneider*, 917 F.2d at 634. Two of those decisions require advance notice even though the union escrowed 100% of the fees upon collection. *Grunwald*, 917 F.2d at 1228; *Tierney*, 824 F.2d at 1505-06. The NEA's Brief at 17-20 argues that those cases are erroneous, because, it says, as long as a challenger's full fee is escrowed and notice precedes the hearing, which need not occur before fees are collected, "there is no reason why notice must be sent before collection begins."

But, because advance reduction is required, pre-collection notice is necessary to enable an individual to pay only the reduced amount determined by the bar or union and, unless the entire amount collected is automatically escrowed, to trigger

escrow of the disputed portion if he wishes to challenge that calculation. In short, advance notice *always* avoids some excessive collection, and *in this case*, impermissible spending as well. Because the Bar's scheme contemplates impermissible spending before any monies are put in escrow, it cannot be sustained even under the NEA's argument. *See supra* pp. 5-6.

Moreover, the premise for the NEA's argument is false. The purpose of notice is not *only*, in general under the due process clause, to apprise an affected individual of an impending hearing, or in specific under *Hudson*, "to enable individuals to file objections which will prevent the spending of their money on nonchargeable activities and, if they wish, to challenge the amount of the fee before an impartial decisionmaker." NEA's Brief at 19-20. Notice also serves other constitutional purposes.

In general, "a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 435 U.S. 247, 262 (1978); *accord Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 n.14 (1985). Taking an individual's property without at least first giving him notice of the grounds for the taking, and that he will later have an opportunity to challenge those grounds, conveys precisely the opposite conviction. It thus is contrary to *Hudson*'s goal of "insur[ing] that the government treads with sensitivity in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12 (emphasis added). *Cf. Barry v. Barchi*, 443 U.S. 55, 65 (1979) (a procedure under which a horse trainer's license was suspended without a pre-suspension hearing did not deny due process, because, *inter alia*, "he was immediately notified of the alleged drugging [and] 16 days elapsed prior to the imposition of the suspension") (emphasis added).<sup>12</sup>

<sup>12</sup> Neither case cited by the NEA's Brief at 20 supports its argument that due process never requires notice prior to a taking if a pre-taking hearing is unnecessary. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978) (emphasis added), held that notice "does not comport with constitutional requirements when it does not advise the customer of the availability of a

In specific, a purpose of the procedural safeguards required by *Hudson*, 475 U.S. at 307 n.20, is to "facilitate a nonunion employee's ability to protect his rights." Collection of a compulsory fee without prior notice of its basis "present[s] the deprived party with a *fait accompli*" that discourages, rather than facilitates, challenges to the fee. See *Gilpin v. AFSCME*, 643 F. Supp. 733, 737 (C.D. Ill. 1986). As a scholar pointed out before *Hudson*, "to effectuate fully the goals underlying *Abood*," a union should be required to make a schedule of yearly disbursements "available for inspection by all employees \* \* \* before an employee has parted with his money," because there "will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 198 (1977) (quoted with approval in *Galda v. Bloustein*, 686 F.2d 159, 168 n.16 (3d Cir. 1982)).

In sum, the information now disclosed by the Bar does not give an attorney "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim," *Hudson*, 475 U.S. at 303 (emphasis added); and only a pre-collection notice of the kind mandated by *Hudson* would.

**III. THE BAR'S MULTIPLE OBJECTION REQUIREMENT IS A NAKED, AND CONSTITUTIONALLY IMPERMISSIBLE, ATTEMPT TO SHIFT THE INITIAL BURDEN OF DESIGNATING WHICH ACTIVITIES ARE CHARGEABLE OR NOT TO THE POTENTIAL OBJECTOR**

Respondents' Brief at 17 characterizes the Bar's requirement that attorneys object to specific issues every time it takes a

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procedure for protesting a *proposed* termination of utility service." The issue in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), was what "form of pretermination hearing" satisfies due process; it was a given that pretermination notice is required.

legislative position<sup>13</sup> as an "obligation of a member to designate which activities or issues he or she believes to be nonchargeable." The Bar thus again, see *supra* pp. 11-12, reveals that its scheme shifts to the individual the burden of initially determining which activities are chargeable or not, despite this Court's holding that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake," dictate that organizations collecting compulsory fees under color of law bear that burden, not the individual potential objector. *Hudson*, 475 U.S. at 306; accord *Schneider*, 917 F.2d at 634-35; see *Keller*, 110 S. Ct. at 2237.

Placing that burden on the Bar, and permitting general objections, is not "unfair" to members who support its political agenda, as Respondents' Brief at 17 complains. It is simply the price that the Constitution requires them to pay for choosing to fund that agenda through mandatory dues rather than voluntary contributions. See *Tierney*, 824 F.2d at 1503 n.2; *Florida Bar Re Schwarz*, 552 So. 2d 1094, 1098 (Fla. 1989) (McDonald, J., dissenting), *cert. denied*, 111 S. Ct. 371 (1990).

Nor can the burden be shifted to the potential dissenter because the Bar wants to know "how many members have objected to a particular position" in order "to rationally judge whether arbitration is economically or ideologically justified." Respondents' Brief at 18. That is merely yet another form of the argument, repeatedly rejected by this Court, that administrative convenience and cost alone justify denying constitutional rights. See *supra* pp. 6-7, 11-12. Moreover, procedural safeguards required by the first amendment cannot be dispensed with on the ground that the number of those whose constitutional rights are at stake might be small, or that the Bar (arrogantly) views their objections as "in bad faith" or "ideologically weak": "the Constitution protects expression and association without regard to \* \* \* the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. at 444-45.

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<sup>13</sup> The Florida Supreme Court reaffirmed its approval of this requirement in *Florida Bar Re Frankel*, No. 76,853 (June 13, 1991).



Under *Hudson*, 475 U.S. at 306 n.16 (emphasis added), and thus under *Keller*, the individual's "'burden' is simply the obligation to make his objection known." Implicit in that holding is the principle first stated in *Allen*, 373 U.S. at 118, that it "would be impracticable to require a dissenting employee to allege \* \* \* each distinct union political expenditure to which he objects." The Court found "strong reasons for preferring the approach of *Allen*" as a constitutional rule in *Abood*, 431 U.S. at 239 n.39, 241. The Bar gives no sound reason for overruling that conclusion.

The first ground on which *Abood* relied is that specific objections disclose "the specific causes to which an individual employee is opposed (which necessarily discloses, by implication, those causes the employee does support)." *Id.* at 241 & n. 42. The Bar merely contradicts the Court, without saying so, arguing that a specific objection discloses "only a belief that the issue is outside the scope of chargeable use of compulsory dues." Respondents' Brief at 19-20. However, if an attorney submits objections to less than all of the political and ideological positions taken by the Bar, he is saying that he does not want to fund voluntarily those positions in particular. The only reasonable inference is, as *Abood* concluded, that he disagrees with the Bar's positions on those issues. Denying that member the right to object generally thus compels him to expose himself to potential hostility or reprisal, see *Abood*, 431 U.S. at 241 n.42, or to continually monitor the Bar's twice-monthly publication to avoid those possible consequences by submitting specific objections to all of the Bar's positions.

That "burden of monitoring all of the numerous and shifting expenditures \* \* \* that are unrelated to" a union's chargeable functions is the second ground on which *Abood*, 431 U.S. at 241, held that only a general objection can be required. The Bar illogically argues that requiring specific objections "places no greater monitoring burden upon the petitioner than he would have if he were permitted to make a general objection." Respondents' Brief at 15. That is simply not true. If the Bar made the type of disclosure required by *Hudson* at the beginning of the dues year, no further monitoring would be necessary. An

attorney could pay full dues, if he did not object to any of the expenses disclosed; make a simple general objection and pay the reduced fee calculated by the Bar, if he believed that the Bar's allocations were reasonable; or make an objection and request arbitration at which the Bar would have the burden of justifying its calculation, if he questioned the Bar's allocations. See, e.g., *Schneider*, 917 F.2d at 635 n.22; *Lehnert*, 707 F. Supp. at 1496-97.

Thus, "the requirement that the Bar provide members with reasonably detailed information regarding the breakdown of expenditures prior to the member having to file an objection" is not "implicitly based upon the assumption that the member requires the information in order to make a rational decision regarding objection on an issue-by-issue basis," as Respondents' Brief at 20-21, asserts. Rather, it is based on the conclusion that "an adequate accounting \* \* \* enables a non-consenting [individual] to intelligently appraise what proportion of his dues would be allocable to" chargeable and nonchargeable activities, *Tierney*, 824 F.2d at 1504, and "to enter an intelligent and informed [general] objection to the use of his [dues] if he desires." *Damiano*, 830 F.2d at 1370; see *Hudson*, 475 U.S. at 306-07 & n.18. It also "prevents unnecessary objections and gives objectors sufficient information to carry on a meaningful challenge in the arbitration process." *Jibson*, 719 F. Supp. at 606.

Moreover, a disclosure which explains what kinds of political and ideological positions the Bar has taken, see *supra* p. 11, would also assist members in making specific objections if they do not want to object generally. A requirement of specific objections is not necessary to protect those hypothetical members who want to support some, but not all, of the Bar's political activity, as Respondents' Brief at 18-19 suggests. Permitting general objections precludes neither specific objections nor voluntary contributions to support particular Bar programs even after a general objection has been made.



**IV. GIBSON'S CLAIM FOR A REFUND WAS CONCRETELY RAISED IN THE DISTRICT COURT, AND HE REQUESTS ONLY A REMAND FOR A DETERMINATION OF THAT CLAIM**

The Bar concedes, as it must under *Abood*, 431 U.S. at 241-42 & n.43, that the prayer for all relief to which he is entitled included in petitioner Gibson's complaint was sufficient to constitute a claim for refund of that part of his compulsory dues used by the Bar in the past to fund constitutionally nonchargeable activities which he challenged. Respondents' Brief at 26. However, the Bar grossly misrepresents the record when it says that "a proposed amendment to the Florida Constitution in 1984" was "the only issue which he challenged." *Id.* at 25 & n.21.

Mr. Gibson's complaint alleged that the Bar "espouses and makes known its view on many political positions and actively lobbies for the same and the costs of such activities are funded by the dues which its members are required to pay." J.A. 9 (emphasis added). Consistent with that allegation, his case was stated in the Pretrial Stipulation at 1 (R.17) (filed Aug. 17, 1984) (emphasis added) as that "use of compulsory Bar dues is prohibited for advocacy of any views in areas designated by this Court as being outside the scope permitted by the First Amendment." Both the district court and court of appeals consequently found that Mr. Gibson presented a claim against all constitutionally nonchargeable political and ideological activities in which the Bar engages, not just opposition to the 1984 Florida constitutional amendment, or even just its legislative lobbying. P.A. 26a, 38a-39a. Indeed, the court of appeals acknowledged that his complaint encompassed the Bar's publications and public relations activities "[i]n addition to traditional legislative lobbying." P.A. 25a n.1.

The Bar also totally misrepresents the record by saying that Mr. Gibson only "mention[ed] the issue of damages on several occasions in the trial court, but never under circumstances calling for a response by the Bar or specific action by the trial court." Respondents' Brief at 26. As Petitioner's Brief at 24 details, on four separate occasions on remand from the court of appeals' first

decision, Mr. Gibson concretely raised his right to a hearing on the refund issue as a ground for granting his motion for an injunction *pendente lite* and for denial of the Bar's motion for final judgment.<sup>14</sup> Thus, Mr. Gibson *did* call for "specific action by the trial court." The Bar responded by arguing in its Reply Memorandum on Motion for Judgment at 2, 5 (filed Dec. 16, 1986) (R.47) that its adoption of procedures purportedly complying with *Hudson* was the only remedy to which Gibson was entitled and that eleventh-amendment and qualified immunity barred any refund. And the district court took "specific action" in response to Mr. Gibson's argument: it denied him the requested hearing by erroneously dismissing the case on the ground that "no further proceedings are required." P.A. 22a-23a.

Admittedly, the record is insufficient for this Court to determine the refund to which Mr. Gibson is entitled, if any, as Respondents' Brief at 25-26 points out. However, that is because the district court precluded the necessary record by erroneously dismissing the case. As a result, the Bar was never held to its burden of proving the proportion of its past expenditures that are constitutionally chargeable. See *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1962 (1991). Neither did the parties brief nor the lower courts determine which bar activities meet the test set out in *Keller*. However, all that Mr. Gibson asks is that the Court reverse the erroneous dismissal of his action and remand the case for further proceedings in which the Bar would be put to its burden of proof and the necessary determinations would be made by the district court. When the Bar's misrepresentations of the record are discounted, Respondents' Brief at 24-26 concedes as much: "he may be entitled to have the question heard, but-not at the appellate level."

Respondents' Brief abandons the Bar's argument that Mr. Gibson's claim for a refund is barred by the eleventh amendment.

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<sup>14</sup> Indeed, he went further than necessary, given the fact that the burden of proof on the issue is on the Bar, see *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1962 (1991), by presenting evidence of some of the political and ideological positions taken by the Bar. See J.A. 18-24, 32-37.

However, eleventh-amendment immunity is a "jurisdictional bar." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Thus, this Court can consider the question *sua sponte*. And if it does not decide the issue, the Bar could reassert that invalid defense on remand. Because both sides have briefed the issue, Opposition to Certiorari at 8-9; Petitioner's Brief at 25-26, and because *Keller* forecloses the Bar's argument as a matter of law, the Court should settle the issue now to avoid possible further unnecessary litigation.<sup>15</sup>

### CONCLUSION

The Court should reverse the decision of the court of appeals and grant all relief requested by petitioner.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.  
*Counsel of Record for Petitioner*

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<sup>15</sup> *Amicus* Wisconsin Bar raises two defenses not briefed by the parties: an argument that *Keller* should not be applied retroactively, Wis. Bar's Brief at 6-9; and qualified immunity, *id.* at 9-11. Its retroactivity argument is bootless after *James B. Beam Distilling Co.*, 59 U.S.L.W. 4735 (U.S. June 20, 1991) (No. 89-680). Whether qualified immunity is available to a private party acting in concert with the state, which is what the Bar is under *Keller*, and whether it applies to equitable restitution (as opposed to civil damages), which is what the claim here is, see *Bowen v. Massachusetts*, 487 U.S. 879, 891-96 (1988), are both questions which this Court has left open and should be determined first on remand. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.34 (1982). The Wisconsin Bar's third argument, that annual "contemporaneous objection" is a prerequisite to restitution, Wis. Bar's Brief at 12-13, is frivolous. Even if Mr. Gibson only "first made known [his] objection to [the Bar's] political expenditures in [his] complaint filed in this action, . . . this was early enough." *Allen*, 373 U.S. at 119 n.6. The Bar was "without power to use payments thereafter tendered by [him] for such political causes." *Machinists v. Street*, 367 U.S. 740, 771 (1961).

No. 90-1102

Supreme Court, U.S.

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. GIBSON,

*Petitioner,*

*v.*

THE FLORIDA BAR, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

BRIEF FOR DAVID P. FRANKEL AND  
JOSEPH W. LITTLE AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER

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April 1991



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No. 90-1102

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1990

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ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**BRIEF FOR DAVID P. FRANKEL AND  
JOSEPH W. LITTLE AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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**INTEREST OF *AMICI CURIAE***

*Amici curiae* David P. Frankel and Joseph W. Little ("*Amici*") are active members of The Florida Bar (the "Bar"). *Amici* were admitted to practice law in Florida in 1980 and 1974 respectively and have been remitting their full compulsory annual dues to the Bar continuously since their admission.

For years *Amici* have protested, both formally and informally, the expenditure of their compulsory dues for purposes not germane to the Bar's core functions. Mr. Little was an *amicus* participant both in the proceedings below in the United States



Court of Appeals for the Eleventh Circuit and in *Keller v. State Bar*, 110 S. Ct. 2228 (1990).

In October 1990, Mr. Frankel filed an original Petition with the Supreme Court of Florida challenging several legislative positions adopted by the Bar. *Florida Bar Re David P. Frankel*, No. 76,853 (Fla. filed Oct. 29, 1990). While that proceeding is described more fully in the argument portion of this *amici curiae* brief, it questions the unlawful and unconstitutional use of compulsory bar dues for legislative lobbying. It also challenges a Bar rule that requires dissenting members to file objections to particular legislative positions adopted by the Bar. See *infra* Appendix ("App.") A. Mr. Little's motion to join in Mr. Frankel's Petition proceeding was granted by the Supreme Court of Florida. See *infra* App. B.

The Bar's Brief in Opposition to Petition for Writ of Certiorari (at page 10) has referred this Court to *Amici's* pending Petition proceeding before the Supreme Court of Florida. That Brief also has referred this Court to an original Petition it filed with the Supreme Court of Florida seeking to amend the Bar's legislative lobbying rules. Since the filing of the Bar's Brief, the Supreme Court of Florida has promulgated the new rules almost verbatim. See *infra* App. E. *Amici* were respondents in that rule amendment proceeding, which is described more fully in the argument portion of this *amici curiae* brief.

On April 9, 1991, the Supreme Court of Florida heard oral argument on *Amici's* Amended Petition and on *Amici's* Motion for an Injunction Pendente Lite in that proceeding. No decision was rendered by the court before the date this *amici curiae* brief was submitted for printing.

## SUMMARY OF ARGUMENT

The *Keller* decision limited the use of compulsory dues by integrated bars to those activities which are "justified by the State's interest in regulating the legal profession and improving the quality of legal services." Despite this clearly articulated constitutional standard, The Florida Bar continues to engage in conduct far beyond the bounds of permissible activity.

*Amici* initiated a proceeding before the Supreme Court of Florida which challenges eight specific lobbying positions taken by the Bar concerning children. Of relevance to the *Gibson* litigation, *Amici's* Amended Petition challenges some of the criteria adopted by the Supreme Court of Florida to guide the Bar in determining whether it may use compulsory dues for certain activities. *Amici's* Amended Petition also challenges a Bar rule that requires dissenters to identify specific Bar lobbying activities with which they disagree.

The Bar's response to *Amici's* Amended Petition takes the extreme position that it may use compulsory dues to lobby on any issues "regardless of their scope" as long as dissenting Bar members are provided with the procedural safeguards set out in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). This is a complete misreading of *Keller*, which established the outer bounds of constitutionally permissible compulsory bar activity. The Bar's position is also contrary to previous advice provided by its own Bar Counsel on the general subject of ideological activities.

The Bar's response to *Amici's* Amended Petition further contends that the Bar can require dissenters to specify particular lobbying activities with which they disagree provided the Bar complies with the *Chicago Teachers* procedures. The Bar's argument is unsupported by the facts of *Chicago Teachers*, a case that simply did not raise or address the subject of general versus specific objections.

In its Brief in Opposition to Petition for Writ of Certiorari in this case, the Bar cited its petition with the Supreme Court of Florida for the proposition that this Court should allow Florida an adequate opportunity to review its rules in light of *Keller* prior to revisiting the issues raised therein. After the Bar's Brief was filed, the Supreme Court of Florida adopted almost verbatim the Bar's petition to amend its legislative lobbying rules. The amended rules increase the already substantial administrative and financial burdens placed upon dissenters who seek to exercise their first and fourteenth amendment rights. In addition, the amended rules do not resolve any of the issues Mr. Gibson has been litigating for seven years.

The decision of the Court of Appeals for the Eleventh Circuit should be vacated and the relief requested by Mr. Gibson should be granted.

#### ARGUMENT

##### I. *AMICUS* PETITION BEFORE THE SUPREME COURT OF FLORIDA

Despite this Court's thoughtful articulation in *Keller* of a constitutional standard for compulsory bars to follow in the expenditure of member dues, The Florida Bar continues to spend dissenters' compulsory dues in violation of their first and fourteenth amendment rights. The Bar's refusal to adhere to the substantive constitutional limits stated in *Keller* demonstrates graphically why this Court should require the Bar to provide more effective procedural safeguards for dissenting members.

On June 4, 1990, this Court held unanimously that compulsory bars may use dissenters' dues only to fund activities of an ideological nature which are "justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Keller*, 110 S. Ct. at 2236. Exactly four months later (on October 4, 1990), The Florida Bar's Board of Governors adopted legislative positions concerning seven subject areas

representing at least twenty-four specific issues. A cursory summary of these legislative positions was announced in an "Official Notice" in the Bar's twice-monthly publication. See Fla. Bar News, Oct. 15, 1990, at 4, col. 2 (*infra* App. A at 17a-19a).

Of the twenty-four specific issues adopted by the Board of Governors, fourteen concern children. The Board of Governors announced the Bar's support of the recommendations of The Florida Bar Commission for Children. *Amicus* Frankel promptly filed an original petition proceeding with the Supreme Court of Florida challenging the Bar's authority to use compulsory dues to support eight of the fourteen specific issues concerning children.<sup>1</sup>

The eight specific legislative positions challenged in *Amici's* Petition, and later in their Amended Petition, are the Bar's support of: (a) expansion of the women, infants and children (WIC) program; (b) extension of Medicaid coverage for pregnant women; (c) full immunization of children; (d) establishing children's services councils; (e) family life and sex education/teen pregnancy prevention; (f) increasing Aid to Families with Dependent Children; (g) enhanced child-care funding and standards; and (h) creation of children's needs consensus estimating conference.

*Amici's* Amended Petition makes three arguments, two of which are relevant to the case *sub judice*. First, *Amici* argue that the Bar cannot sustain its burden of proof that the above-listed legislative positions satisfy the standards adopted by the Supreme Court of Florida in *Florida Bar Re Schwarz*, 552 So. 2d 1094, 1095 (Fla. 1989), *cert. denied*, 111 S. Ct. 371 (1990). This is essentially a state law argument and is therefore not directly relevant to the *Gibson* case. See *infra* App. A at 2a-8a.

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<sup>1</sup> On January 4, 1991, the Supreme Court of Florida granted *Amicus* Little's motion to join as a co-petitioner. See *infra* App. B at 27a. For convenience, the remainder of this *amici curiae* brief refers to the petition proceeding before the Supreme Court of Florida as though it had been filed by both *Amici* simultaneously.



Next, *Amici's* Amended Petition maintains that the first and fourteenth amendment rights of dissenting Bar members to be free from compelled speech and association are violated by some of the criteria adopted by the Supreme Court of Florida in *Schwarz* to guide the Bar in determining whether it may use compulsory dues for certain activities. Specifically, *Amici* challenge the *Schwarz* criteria that authorize lobbying outside the core functions of the Bar where the following elements are met:

- (1) That the issue be recognized as being of great public interest;
- (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and
- (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

*Schwarz*, 552 So. 2d at 1095. In essence, *Amici* assert that application of the *Keller* standards demonstrates that these *Schwarz* criteria are unconstitutional both on their face and as applied to the eight enumerated legislative positions concerning children. See *infra* App. A at 8a-11a.

Finally, *Amici's* Amended Petition contends that in accordance with this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977), the Bar is required to recognize its members' general objections to the use of their compulsory dues to fund legislative lobbying activities and is further required to provide refunds based upon general objections. See *infra* App. A at 11a-14a.

## II. THE BAR HAS ASSERTED INCORRECTLY THAT ITS AUTHORITY TO USE COMPULSORY DUES FOR LOBBYING IS VIRTUALLY UNLIMITED

Pursuant to an order of the Supreme Court of Florida, the Bar filed a response to *Amici's* Amended Petition. See *infra* App.

C at 28a-56a.<sup>2</sup> The Bar's response takes an extreme view of the limits of its constitutional authority to engage in ideological lobbying with its dissenting members' compulsory dues. The Bar states:

The three *Schwarz II* criteria, if confirmed as pronouncements of The Florida Bar's range of corporate authority in the political arena, present absolutely no federal constitutional question, regardless of their scope, provided member dissent is accommodated consistent with *Chicago Teachers* for those issues advocated beyond *Keller's* two core areas.

See *infra* App. C at 41a. In effect, the Bar is arguing that it may use compulsory dues to lobby on any issue, such as abortion, gun control or flag desecration, as long as dissenting Bar members are provided an adequate explanation of the basis of their compulsory dues, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending. See *Chicago Teachers*, 475 U.S. at 310.

Plainly, the Bar's argument is a complete misreading of *Keller* and is contrary to that decision. In fact, *Keller* represents the outer bounds of permissible use of compulsory dues. In a passage that is at direct odds with the Bar's argument, the Court declared: "[T]he extreme ends of the spectrum are clear. Compulsory dues may not be expended to endorse or advance a gun control or nuclear freeze initiative." *Keller*, 110 S. Ct. at 2237. The Court did not limit this conclusion by providing that compulsory dues could be so expended if the *Chicago Teachers* procedures were implemented.

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<sup>2</sup> Because the first argument *Amici* raise in their Amended Petition concerns proper interpretation of state law, the Bar's response to it is not summarized in this *amici curiae* brief. For the Bar's response on the state law issue, see *infra* App. C at 34a-39a.



The Bar's argument on this point is also contrary to the advice that the Bar's Counsel of Record in this case, Barry Richard, provided to Bar President James Miller on October 17, 1990. See *infra* App. D at 57a-60a. In that opinion, the Bar Counsel considered the applicability of the *Schwarz*, *Gibson*, and *Keller* decisions to a proposal that the Bar boycott a community to show support for the welfare of minority groups there. Bar Counsel Richard stated:

The [*Keller*] Court held that a bar cannot spend compulsory dues over a member's objections for ideological activities not germane to the purposes for which compelled association is justified. The Court found that purpose to be "regulating the legal profession and improving the quality of legal services."

. . . .

The essence of all of the foregoing cases is that The Florida Bar is not a general social action association with the freedom to engage in any activity it chooses. There are voluntary bar associations at the local and national levels which do have that freedom. The Florida Bar does not. It derives its power to compel membership from a very circumscribed purpose and it is limited in its pursuits to fulfilling that purpose.

The Bar Counsel's advice was not circumscribed by whether the *Chicago Teachers* procedures were available. Indeed, the *Chicago Teachers* decision is not mentioned in the opinion letter. *Amici* assert that the Bar must apply a similarly narrow construction of the same cases to the lobbying positions challenged in their Amended Petition and by Mr. Gibson. The only principle the Bar appears capable of articulating is that it can use compulsory dues for lobbying whenever it wants to.

### III. THE BAR'S ASSERTION THAT IT MAY REQUIRE DISSENTING MEMBERS TO SUBMIT OBJECTIONS TO SPECIFIC ISSUES IS CONTRARY TO CLEAR PRECEDENT OF THIS COURT

The Bar's response also purports to address the issue of general versus specific objections to legislative activities. The Bar contends as follows:

Prior to the holding in *Chicago Teachers* that a union's collection of proportionate share payments must include "an adequate explanation of the basis for the fee," it was quite logical for the *Abood* Court to have been sensitive to a dissident's difficulty in identifying "the specific expenditures" [97 S.Ct. at 1802] for possible objection, and in monitoring "all the numerous and shifting expenditures" [97 S.Ct. at 1803] that a union might incur. Now, however, a member objection procedure which comports with *Chicago Teachers* should vitiate that argument—especially when the formal notice provisions of that procedure include specificity as to contestable matters and substantially reduce any burden of monitoring the organization's political activities.

See *infra* App. C at 42a. The Bar appears to be arguing that it may require dissenters to specify particular lobbying activities with which they disagree provided the Bar complies with the *Chicago Teachers* procedures. If this is what the Bar is arguing, this Court has supplied no support for it in the *Chicago Teachers* decision. Indeed, prior to initiating litigation, some of the *Chicago Teachers* plaintiffs had made specific objections; some had made only general objections; and some had made no objections at all. However, *all* were ultimately granted the same relief on federal constitutional grounds. The subject of general versus specific objections was simply not an issue in the *Chicago Teachers* case.

#### IV. THE BAR'S RECENTLY AMENDED LEGISLATIVE LOBBYING RULES EXACERBATE THE CONSTITUTIONAL INFIRMITIES AT ISSUE IN THE *GIBSON* CASE

On March 26, 1991, the Supreme Court of Florida amended the rules impacting on the Bar's legislative lobbying program. The amendments increase the already substantial administrative and financial burdens placed upon dissenters who seek to exercise their first and fourteenth amendment rights.

The amendments may be summarized as follows. First, the amended rules attempt to maintain the confidentiality of members filing particular objections. *See infra* App. E, Amended Rule 2-3.10 and 2-9.3(c). Second, they provide successful dissenters with the statutory rate of interest on judgments for their refunds from the date their dues were received by the Bar. *See id.* Amended Rule 2-9.3(c)(3), (e)(4). Third, in the event a dissenter's objection is referred to arbitration, they establish venue in Leon County, Florida unless otherwise determined by a majority of the arbitration panel. *See id.* Amended Rule 2-9.3(e). Fourth, they clarify that the Bar must prove by the greater weight of the evidence that the legislative matters at issue are constitutionally justified. *See id.* Fifth, they place on nonprevailing parties in arbitration proceedings, the burden of compensating all three arbitrators (to be paid at an hourly rate equal to that of a circuit court judge).<sup>3</sup> *See id.* Amended Rule 2-9.3(e)(5)-(6). Sixth, they exclude from the Bar's expenses for its legislative activities the costs of any arbitration proceeding. *See id.* Amended Rule 2-9.3(e)(7).

Two aspects of these rule amendments are particularly chilling to dissenters. First, the amendment that establishes venue for arbitration proceedings in Leon County, Florida unless otherwise determined by a majority of the panel could force dissenters to travel hundreds (or even thousands) of miles to

<sup>3</sup> The rule amendment is unclear on whether nonprevailing parties also have to compensate the prevailing party for its legal fees and costs.

present their case. For example, as an active Bar member who resides and works in Washington, D.C., *amicus* Frankel could be required to travel to Tallahassee, Florida to present or participate in his case.

Second, the amendment places on nonprevailing parties in all arbitration proceedings, the substantial cost of compensating all three arbitrators. Depending upon the complexity of the arbitration, this could result in the assessment of thousands of dollars. Since the specific lobbying activity a dissenter challenges will constitute only a small portion of the annual dues of \$190.00, the potential benefits to be gained from a successful arbitration will be greatly outweighed by the potential costs of an adverse decision. In this regard, it should be noted that both before and after the amendments, the rules provide that the arbitration panel's decision is binding on both the dissenting member and the Bar. *See Fla. Stat. Ann.*, vol. 35, Rule 2-9.3(e)(2) of the Rules Regulating The Florida Bar (West Supp. 1991). *But see Chicago Teachers*, 475 U.S. at 308 n.21 ("The arbitrator's decision would not receive preclusive effect in any subsequent [42 U.S.C.] § 1983 action.").

Thus, the amendments add significantly to the administrative and financial burden of dissenters who wish to challenge the Bar's lobbying activities. Dissenters will be effectively chilled from exercising their fundamental first and fourteenth amendment rights.

In addition, even though the Supreme Court of Florida adopted almost verbatim the Bar's rule amendment petition, the amended rules do not resolve any of the issues Mr. Gibson has been litigating for seven years. The Bar still is not required by its rules to: implement an advance reduction; provide advance notice of dues to be used for non-germane activities; accept general objections to its lobbying activities; and provide Mr. Gibson with a refund for past unconstitutional expenditure of his compulsory dues.

## CONCLUSION

By ignoring clear precedent of this Court and erecting significant barriers before those wishing to exercise their fundamental first and fourteenth amendment rights, The Florida Bar treats its dissenting members with disdain. The fact that such unlawful treatment comes from an organization whose Oath of Admission requires its members to solemnly swear to "support the Constitution of the United States" is more than ironic.

*Amici* and others have made numerous unsuccessful attempts short of litigation to convince the Bar to abide by the law. Apparently, the Bar is more concerned with the potential loss of revenue and authority that may accrue from these proceedings than it is with protecting the constitutional rights of its members.

The decision of the Court of Appeals for the Eleventh Circuit should be vacated and the relief requested by Mr. Gibson should be granted.

Respectfully submitted,

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April 1991

## APPENDICES



**APPENDIX A**

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**AMENDED PETITION OF DAVID P. FRANKEL  
FILED ON NOVEMBER 5, 1990**

*Florida Bar Re David P. Frankel,*  
**No. 76,853 (Fla. filed Oct. 29, 1990)**

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IN THE  
SUPREME COURT OF FLORIDA

THE FLORIDA BAR

CASE NO. 76,853

Re David P. Frankel

INTRODUCTION TO AMENDED PETITION

PETITIONER, David P. Frankel, Esquire, is an active member in good standing of The Florida Bar.<sup>1</sup> PETITIONER submits this Amended Petition because he questions the propriety of eight recommendations pertaining to a legislative position adopted by the Board of Governors (the "Board") of The Florida Bar during its meeting of October 4, 1990 and officially noticed to the Bar membership in the October 15, 1990 issue of The Florida Bar News.<sup>2</sup>

PETITIONER comes before the Supreme Court of Florida, in accordance with this Court's statement in The Florida Bar re Schwarz, 552 So.2d 1094, 1097 (Fla. 1989) (hereinafter "Schwarz"), that "any member of The Florida Bar in good standing may question the propriety of any legislative position

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<sup>1</sup> While PETITIONER is an attorney with the Federal Trade Commission ("FTC"), he is pursuing this Amended Petition solely as a member of The Florida Bar and not in his capacity as an attorney with the FTC. Therefore, the views expressed in this Amended Petition are solely the PETITIONER's and do not represent those of the FTC.

<sup>2</sup> This Amended Petition would have been submitted sooner, but because The Florida Bar membership records department had altered PETITIONER's mailing address on its own, without notice to PETITIONER, PETITIONER did not receive his copy of the October 15, 1990 issue of The Florida Bar News until October 23, 1990. PETITIONER has taken steps to correct this error for the future.

taken by the Board of Governors by filing a timely petition with this Court." PETITIONER, as set forth more fully below, petitions this Court for a declaration that the eight recommendations pertaining to the legislative position discussed in this Amended Petition are improper when considered against the standards adopted by this Court in Schwarz. Petitioner further petitions this Court for a declaration that the "additional criteria" adopted in Schwarz are violative of the First and Fourteenth Amendments to the United States Constitution, both by their express language and as applied. PETITIONER further petitions this Court to issue an order enjoining The Florida Bar, both pendent lite and thereafter, from engaging in any lobbying activities pertaining to the eight recommendations discussed in this Amended Petition, as well as any lobbying activities not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar. Finally, PETITIONER urges the Court to order The Florida Bar to recognize general objections made by Bar members who object to the Bar's spending any portion of their compulsory Bar dues on legislative lobbying activities or amicus brief filings.

**THE FLORIDA BAR CANNOT SUSTAIN ITS BURDEN OF PROOF THAT THE LEGISLATIVE POSITIONS AT ISSUE SATISFY THE STANDARDS ADOPTED BY THE SUPREME COURT OF FLORIDA IN SCHWARZ.**

The October 15, 1990 issue of The Florida Bar News at page 4 contains an "Official Notice" under the heading "Legislative positions adopted" which notifies Bar members that the Board of Governors adopted seven legislative positions during its meeting of October 4, 1990. A copy of the Official Notice is attached as Appendix A. One of those seven adopted positions—number 6—concerns the Board's decision to support fourteen recommendations of The Florida Bar Commission for Children relating to:

- a. Expansion of the women, infants and children (WIC) program.
- b. Extension of Medicaid coverage for pregnant women.
- c. Full immunization of children.
- d. Establishing children's services councils.
- e. Family life and sex education/teen pregnancy prevention.
- f. Increasing Aid to Families with Dependent Children.
- g. Enhanced child-care funding and standards.
- h. Creation of children's needs consensus estimating conference.
  - i. Establish child-care funding and standards.
  - j. Termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants.
  - k. Guardians Ad Litem-dissolution and custody.
  - l. Establish foster care review boards.
  - m. Eliminate select public disclosure exemptions in child abuse cases.
  - n. Development of juvenile offender rehabilitation and treatment programs.

Of these fourteen recommendations, only the final six (items 6.i. through 6.n.) colorably satisfy the Schwarz standards, and even some of these six probably fail the test. The descriptions of these six recommendations are too vague to determine whether they satisfy the Schwarz standards.<sup>3</sup>

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<sup>3</sup> Rather than complicate this Amended Petition with arguments over whether the final six recommendations of The Florida Bar Commission for Children meet the Schwarz standards, PETITIONER will concede, for purposes of this Amended Petition only, that recommendations 6(i) through 6(n) comport with the Schwarz standards. PETITIONER further notes, however, that it is the Bar that bears the burden of proof on all legislative lobbying positions and



In Schwarz, this Court expressly "approve[d] the recommendations of the Judicial Council [of Florida] and adopted them as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar." Id. at 1098. Thus, these are the standards this Court must apply to test recommendations 6.a. through 6.h. at issue in this Amended Petition. Moreover, as the Court made clear in Schwarz, it is the Bar that "carries the burden of proof" that its legislative lobbying activities comport with the Schwarz standards. See id. at 1098; accord Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) ("the Bar bears the burden of proving that its expenditures were constitutionally justified."). The Bar cannot carry that burden here.

The Judicial Council recommended, and the Schwarz Court adopted, that the following subject areas be recognized as clearly justifying legislative activities of the Bar:

- (1) Questions concerning the regulation and discipline of attorneys;
  - (2) matters relating to the improvement of the functions of the courts, judicial efficacy and efficiency;
  - (3) increasing the availability of legal services to society;
  - (4) regulation of attorneys' client trust accounts;
- and

---

nothing contained in the Bar's Official Notice explains how these six recommendations comport with the Schwarz standards.

For example, it is possible, that recommendation 6.j. (concerning the termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants) may be designed to improve the functioning of the courts, judicial efficacy and efficiency. However, the report of The Florida Bar Commission for Children may express other, unrelated reasons for this recommendation that have nothing to do with judicial efficiency. The Official Notice contained in the Bar News does not provide any rationale for any of the fourteen recommendations.

- (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

See id. at 1095.

The Judicial Council further recommended, and the Court adopted in Schwarz, that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the above specifically-identified areas:"

- (1) That the issue be recognized as being of great public importance;
- (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and
- (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

See id.

None of the first eight recommendations of The Florida Bar Commission for Children, as adopted by the Board as legislative positions of the Bar (legislative positions 6.a. through 6.h.), meet the Schwarz standards. None of those eight recommendations concern: (1) "the regulation and discipline of attorneys"; (2) "matters relating to the improvement of the functions of the courts, judicial efficacy and efficiency"; (3) "increasing the availability of legal services to society"; (4) "regulation of attorneys' client trust accounts"; or (5) "the education, ethics, competence, integrity and regulation as a body, of the legal profession."

Rather than demonstrate in detail how each of the eight recommendations fails to meet the Schwarz standards, PETITIONER will apply those five standards to one of the eight recommendations for illustrative purposes only. Recommendation 6.c. pertains to full immunization for children, a subject that

has no relationship to the regulation and discipline of attorneys; that will not improve the functions of the courts, judicial efficacy and efficiency; that will not increase the availability of legal services to society; that has no bearing upon the regulation of attorneys' client trust accounts; and that has no bearing upon the education, ethics, competence, integrity and regulation as a body, of the legal profession. In any event, the Bar bears the burden of proof to demonstrate how such standards are met, which PETITIONER asserts the Bar cannot achieve.

— Plainly, the Board cannot demonstrate that legislative positions 6.a. through 6.h. are subject areas "recognized as clearly justifying legislative activities by the Bar." Thus, the issue becomes whether legislative positions 6.a. through 6.h. are "recognized as being of great public interest," and "that lawyers are especially suited by their training and experience to evaluate and explain the issue," and that "the subject matter affects the rights of those likely to come into contact with the judicial system." Here, unlike the subject areas that are clearly justified as recognized area for legislative activities, the Bar must demonstrate that all three criteria are met. Once again, PETITIONER asserts that the Bar is unable to meet this burden.

While PETITIONER disagrees with such a broad reading of the "great public interest" criterion, he concedes, for purposes of the Amended Petition only, that legislative positions 6.a. through 6.h. may satisfy the first prong of the three prong standard.

The second prong of this standard, however, is clearly not met here for any of the eight legislative positions at issue. None of these positions pertain to issues "that lawyers are especially suited by their training and experience to evaluate and explain." To illustrate, PETITIONER turns again to legislative position 6.c.: "full immunization of children." PETITIONER asserts that few, if any, lawyers (responding as lawyers rather than as parents) could recite what types of immunization are available for children, at what cost, who pays for those immunizations, when they are to be provided, how frequently, and by whom. Moreover, PETITIONER is unaware of any subjects taught in law

school or in any Continuing Legal Education courses that train law students or practitioners on the subject; or of any subjects tested on the Florida Bar Examination that cover these issues. In short, lawyers have no special training and experience to evaluate and explain proper public policy on full immunization for children,<sup>4</sup> and have far less training and experience in this area than doctors and other allied health professionals, social workers, and public health officials.

The third prong of this Schwarz standard is also clearly not satisfied here. None of these issues affects the rights of those likely to come into contact with the judicial system. Although every person at some point in life may come into contact with the judicial system as a party, witness, juror, or court employee, such ordinary contact cannot be what the Court meant in the Schwarz criterion that the issues to be lobbied on "affect the rights of those likely to come into contact with the judicial system."

This Schwarz criterion must require some substantial nexus between: (1) the rights affected by the issue being lobbied on; and (2) the reason for the contact with the judicial system. Two illustrations here may be useful. If the Florida Legislature proposes to enact a statute that would require mandatory prison sentences for certain types of criminal offenses, the Bar should be able to meet its Schwarz burden of demonstrating that this will affect the rights of certain criminal defendants when they come into contact with the judicial system.

By contrast, a legislative proposal to require the public funding of full immunization for all children from tax revenues would affect the rights of children, but not with any relation to their contact with the judicial system. In short, to hold that Bar lobbying on full immunization for children meets this Schwarz criterion would be tantamount to holding that any proposed

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<sup>4</sup> If the Bar is permitted to lobby on "full immunization for children" what is to prevent it from lobbying on additional (or fewer) homeless shelters, additional (or less) maintenance of roads, additional (or fewer) parks, etc?



legislation affecting the rights of any group or individual would affect the rights of those who may at any time come into contact with the judicial system. Such an interpretation would render this Schwarz criterion a dead letter. The analysis applied here to the "full immunization for children" legislative position applies equally for the other legislative positions contained in 6.a. through 6.h.

In sum, the Bar cannot carry its burden of proof that legislative positions 6.a. through 6.h. fall within any of the five subject areas recognized in the Schwarz decision as clearly justifying legislative activities by the Bar. Similarly, the Bar cannot carry its burden of proof that these legislative positions fall within the additional criteria used to determine the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside the five subject areas enumerated in the Schwarz decision. Thus, PETITIONER respectfully requests this Court to enjoin the Bar, both pendente lite and thereafter, from engaging in any lobbying on legislative positions 6.a. through 6.h.

**THE THREE "ADDITIONAL CRITERIA" ADOPTED  
IN SCHWARZ VIOLATE THE FIRST AND FOUR-  
TEENTH AMENDMENT RIGHTS OF DISSENTING  
BAR MEMBERS TO BE FREE FROM COMPELLED  
SPEECH AND ASSOCIATION**

The First Amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I. This language has been interpreted by the Supreme Court of the United States as protecting both the right to speak and to associate freely, as well as the right not to speak or associate. See, e.g., Abood v. Detroit Board of Education, 431 U.S. 209, 234-35 (1977).

The First Amendment is applicable to the states via the Fourteenth Amendment. See, e.g., DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925). The Florida Bar is "an official arm" of the Supreme Court of Florida and this Court has, by its rules, established "the authority and responsibilities" of the Bar. See Rules Regulating The Florida Bar, Ch. 1 (General Introduction). As an official arm of the State of Florida, The Florida Bar is bound by the First and Fourteenth Amendments. See Keller v. State Bar of California, 110 S. Ct. 2228 (1990).

In Abood, the Supreme Court of the United States applied the First and Fourteenth Amendments to a labor union that engaged in ideological activities with compulsory dues collected in part from non-union members. The Court held that a union cannot expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified. Abood, 431 U.S. at 222-23. In that case, the compelled association was justified only by the union's collective bargaining activities. Thus, any funds expended by the union for ideological activities not germane to collective bargaining were violative of the First and Fourteenth Amendments.

Recently, the Supreme Court applied its Abood analysis to the State Bar of California. Keller, 110 S. Ct. 2228 (1990). Like The Florida Bar, the State Bar of California is an integrated bar that performs a variety of functions, such as "examining applicants for admission, formulating rules of professional conduct, disciplining members for misconduct, preventing unlawful practice of law, and engaging in study and recommendation of changes in procedural law and improvement of the administration of justice." Id. at 2231. Indeed, the State Bar of California has a stronger claim to perform these functions than does The Florida Bar because the State Bar of California is created by California statute, while The Florida Bar is merely an official arm of this Court.

Despite the broad statutory mandate of the State Bar of California to improve "the administration of justice," the



Supreme Court ruled that the bar was prohibited from expending compulsory dues of dissenting members on matters not germane to the regulation of the legal profession and improvement of the quality of legal services. Specifically, the Court declared:

Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

*Id.* at 2236.

In its Schwarz decision, this Court adopted a three part test to be applied when determining "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the [five] specifically-identified areas" adopted by the Court. *See supra* pp. 5-6.

This three part test, by necessary implication, permits The Florida Bar to use compulsory dues of dissenting Bar members to engage in ideological activities not germane to "regulating the legal profession and improving the quality of legal services." After all, there are likely to be many issues that are "recognized as being of great public importance," where lawyers have the "training and experience to evaluate and explain" the issues, and where the issues affect "the rights of those likely to come into contact with the judicial system," but nevertheless are not germane to "regulating the legal profession and improving the quality of legal services." Any such issues must not be lobbied upon by The Florida Bar through the use of the compulsory dues of dissenting members. In addition, the fact that the Board has adopted legislative lobbying positions 6.a. through 6.h. demonstrates that the Bar is applying the Schwarz criteria in a manner that is violative of the First and Fourteenth Amendments.

Thus, this aspect of the Schwarz standard is an unconstitutional infringement of dissenting Bar members' First and Fourteenth Amendment rights against compelled speech and association. PETITIONER therefore respectfully requests this Court to abrogate the "additional criteria" adopted in its Schwarz decision and to enjoin The Florida Bar, both pendent lite and thereafter, from engaging in any lobbying on legislative positions not clearly within the five subject areas recognized by the Court in Schwarz as clearly justifying legislative activities by the Bar.

**IN ACCORDANCE WITH ESTABLISHED PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES, THE FLORIDA BAR IS REQUIRED TO RECOGNIZE ITS MEMBERS' GENERAL OBJECTIONS TO THE USE OF THEIR COMPULSORY DUES TO FUND LEGISLATIVE LOBBYING ACTIVITIES AND IS FURTHER REQUIRED TO PROVIDE REFUNDS FOR SUCH GENERAL OBJECTIONS**

Rule 2-9.3(c) of the Rules Regulating The Florida Bar requires dissenting Bar members to "file with the executive director a written objection to a particular position on a legislative issue." Thus, by clear implication from the Rule as well as advice provided by the Bar,<sup>3</sup> general objections to the Bar's legislative activities are not recognized.

Nevertheless, for the past two years, PETITIONER has paid his annual compulsory Bar dues in full with an accompanying letter demanding that no portion of his compulsory Bar dues be used directly or indirectly to fund or support any legislative lobbying by or on behalf of The Florida Bar. Copies of these two

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<sup>3</sup> *See* Appendices B and C for an example of an exchange of correspondence between PETITIONER and the Bar on the issue of general objections to the Bar's legislative activities.

letters are attached to this Amended Petition as Appendices D and E.<sup>6</sup>

In response, the Bar has asserted that it may lawfully compel PETITIONER, as a dissenting Bar member, to contribute compulsory dues for lobbying activities on the basis of the United States Supreme Court's decision in Keller and the Eleventh Circuit's decision in Gibson v. The Florida Bar, No. 89-3388 (11th Cir. July 23, 1990), as well as the opinion of Bar counsel. Despite numerous requests, the Bar has never explained in any detail to PETITIONER why the Bar will not recognize PETITIONER's general objections to its legislative activities. Thus, the Bar has refused to recognize PETITIONER's general objections to the Bar's lobbying program and has insisted that PETITIONER submit written objections to particular legislative positions in order to receive refunds for the compulsory dues related to the particular objections.

Established precedent of the Supreme Court of the United States, interpreting the First and Fourteenth Amendments to the United States Constitution, make it clear that those who are compelled to pay dues to practice their livelihoods (including

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<sup>6</sup> PETITIONER's letter of August 8, 1990 to the Bar (Appendix C) is slightly broader than his letter of June 14, 1989 (Appendix B) in that the 1990 letter includes amicus filings as well as legislative lobbying. This addition was deemed necessary because the December 1, 1989 issue of The Florida Bar News reported that the Board voted to file its own amicus brief in a case pending before the Supreme Court of the United States. It was further reported that the Board had voted to spend up to \$10,000 to have counsel prepare the brief and to have the brief printed. While PETITIONER was subsequently informed by the Bar that none of the authorized \$10,000 was spent, PETITIONER recognized that the filing of amicus briefs raises identical issues as those raised by lobbying before the Florida Legislature or Congress.

In Keller, 110 S. Ct. at 2231 n.2, the Supreme Court treated the dissenting bar members' objections to the bar's amicus brief filing program in the same manner it treated the dissenting bar members' objections to the bar's legislative lobbying and resolution adoption activities.

lawyers) may assert general objections to lobbying activities conducted by the recipients of their compulsory dues. Such persons cannot be required to identify specific expenditures to which they object. In Abood, 431 U.S. 209 (1977), the Supreme Court held that non-union teachers could not be compelled to contribute to various political and other ideological activities that they did not approve of. In its decision, the Court stated as follows:

But in holding that as a prerequisite to any relief each appellant must identify to the Union the specific expenditures to which he objects, the Court of Appeals ignored the clear holding of Allen. As in Allen, the employees here indicated in their pleadings that they opposed ideological expenditures of any sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Id. at 241 (emphasis in original).

The Abood decision was cited with approval and relied heavily upon by the Supreme Court of the United States in its recent decision in Keller. This fact makes it evident that Abood is applicable to compulsory bar associations such as The Florida Bar. Dissenting Bar members cannot be compelled to identify specific expenditures to which they object. To the extent that the decisions of this Court and the Eleventh Circuit are inconsistent, they must give way to the clear precedent established by the Supreme Court of the United States.



Similarly, in Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986), the Eleventh Circuit reached an analogous conclusion. The federal appellate court, relying upon Abood and applying it to The Florida Bar, stated: "Lawyers would only have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right not to disclose his beliefs." Id. at 1570 n.5.

Moreover, in Schneider v. Colegio de Abogados de Puerto Rico, 682 F. Supp. 674 (D.P.R. 1988), the court applied Abood and invalidated a rule of the integrated bar association that required dissenting bar members to identify specific activities they did not wish to fund. The court stated:

As a separate matter, the 1986 Rule requires dissenting attorneys to object at the end of the year to specific activities they do not wish to fund. . . . The general objection filed initially acts merely as a "notice of the right to object," and no refund is made until the Review Board adjudicates the specific objections. . . . That, of course, violates the specific mandate of Abood, 431 U.S. at 241 . . . . Once it is determined how much was spent for the activities forecast in the budget that do not come under one of the permissible headings, all those who made general objections should automatically be refunded the proper proportion of their funds.

Id. at 689 (citations to bar rule and quotation from Abood deleted).

Thus, PETITIONER respectfully requests this Court to require The Florida Bar to recognize the established right of all dissenting Bar members to state general objections to the Bar's lobbying activities and to provide dissenters with refunds of all compulsory Bar dues used for legislative lobbying.

## PRAYER FOR RELIEF

THEREFORE, PETITIONER prays that the Supreme Court of Florida:

- (1) Declare that legislative positions 6.a. through 6.h., as adopted by the Board of Governors during its October 4, 1990 meeting are improper when considered against the standards adopted by the Court in Schwarz;
- (2) Declare that the "additional criteria" adopted by the Court in Schwarz must be abrogated in light of the First and Fourteenth Amendments to the United States Constitution;
- (3) Issue an order enjoining The Florida Bar, pende lite and thereafter, from engaging in any lobbying activities to support legislative positions 6.a. through 6.h.;
- (4) Issue an order enjoining The Florida Bar, pende lite and thereafter, from engaging in any lobbying activities to support any legislative positions that are based solely upon the three "additional criteria" adopted by the Court in Schwarz;
- (5) Issue an order requiring The Florida Bar to recognize PETITIONER's established right to state general objections to the Bar's lobbying activities and to provide PETITIONER with refunds of all compulsory Bar dues expended on his behalf (plus interest at the legal rate) for legislative lobbying for the dues years 1989-90 and 1990-91, as well as any future years for which PETITIONER submits similar general objections;
- (6) Issue an order invalidating the "particular position" language of Rule 2-9.3(c) of the Rules Regulating The Florida Bar and requiring The Florida Bar to recognize all other dissenting Bar members' rights to state general objections to the Bar's lobbying activities and to provide such dissenting members with appropriate refunds (plus interest at the legal rate), as well as any



future years for which other dissenting members submit similar general objections;

(7) Award PETITIONER such additional relief as the Court may deem just and proper; and

(8) Award PETITIONER his costs of this Amended Petition.

Respectfully submitted,

/s/

David P. Frankel  
Florida Bar Number 311596  
4336 Garrison Street, N.W.  
Washington, D.C. 20016-4035  
(202) 326-2166

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Petition was served via first class mail this 1st day of November, 1990, upon John F. Harkness, Jr., Esquire, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

/s/

David P. Frankel

#### APPENDIX A

**The Florida Bar News/October 15, 1990 [page 4]**

#### Official Notice

#### Legislative positions adopted

The Board of Governors of The Florida Bar adopted the following legislative positions during its October 4 meeting:

1. Supports expansion of the juror pool to include any persons at least 18 years old who are citizens of the state, residents of their respective counties, and who possess a valid Florida drivers license.
2. Opposes legislation which would repeal the discovery rule relating to depositions in criminal cases.
3. Opposes legislation which would impair IOTA funding for legal services programs.
4. Supports the following positions regarding merit selection and retention of trial judges:
  - a. The present, existing system for merit selection for appellate judges should be adopted for trial court judges.
  - b. A Colorado-style citizens board should be established to report retention recommendations.
  - c. JQC decisions to remove a judge or justice from office or to impose other sanctions should be by a vote of two-thirds of the JQC, and its decisions should be binding unless overruled by no fewer than five justices of the Florida Supreme Court.
  - d. If statewide merit selection and retention cannot be obtained through the legislature and the required referendum for constitutional amendments, then the state should adopt local option merit selection and retention on an opt-out circuitwide basis.

e. A judge should serve a minimum of one year following appointment prior to any retention election.

5. Supports appropriation of \$90,000 for the judicial clerkship intern program with the proviso that these funds be used to provide stipend and relocation expenses to a minimum of 20 participants in the Florida Judicial Clerkship program.

6. Supports the recommendations of The Florida Bar Commission for Children relating to:

- a. Expansion of the women, infants and children (WIC) program.
- b. Extension of Medicaid coverage for pregnant women.
- c. Full immunization of children.
- d. Establishing children's services councils.
- e. Family life and sex education/teen pregnancy prevention.
- f. Increasing Aid to Families with Dependent Children.
- g. Enhanced child-care funding and standards.
- h. Creation of children's needs consensus estimating conference.
- i. Establish family court divisions in each circuit.
- j. Termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants.
- k. Guardians Ad Litem-dissolution and custody.
- l. Establish foster care review boards.
- m. Eliminate select public disclosure exemption in child abuse cases.
- n. Development of juvenile offender rehabilitation and treatment programs.
- o. Supports the resolution of the Florida Law Related Education Association encouraging the Florida Legislature to restore full funding to the Law Education Minigrant Program.

### Legislative objections

Under Rule 2-9.3(b)-(e), Rules Regulating The Florida Bar, active members of the Bar may file a written objection to any legislative position adopted by the Board.

Objections properly filed within 45 days of this *News* issue will be considered for a refund of that portion of mandatory dues applicable to the contested legislative position. Within an additional 45 days, the Bar's governing board has the option to grant the appropriate refund to an objector or refer the matter to arbitration.

The arbitration process will determine solely whether the legislative position at issue is within those acceptable activities for which compulsory dues may be used under applicable constitutional law. The objecting member's dues allocable to the contested legislative position will be escrowed promptly upon receipt of the objection, and any refund will bear legal interest.

Any active member may provide written notice to the executive director of The Florida Bar, setting forth an objection to a particular legislative position. Failure to object within 45 days of this *News* issue shall constitute a waiver of any right to object to the particular legislative position.

The policy requires the Bar to publish those legislative positions adopted by the Board in the *News* issue immediately following the meeting at which action was taken.

APPENDIX B

4336 Garrison Street, N.W.  
Washington, D.C. 20016  
July 18, 1990

Mr. John F. Harkness, Jr.  
Executive Director  
The Florida Bar  
Tallahassee, Florida 32301-8226

Re: Legislative Policies

Dear Mr. Harkness:

I am in receipt of your letter to me dated June 19, 1990 in which you replied to my letter dated June 6, 1990. Clearly, I disagree with the Bar's interpretation of (as you refer to it) "its Abood obligations."

In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Supreme Court held that non-union teachers could not be compelled to contribute to various political and other ideological activities that they did not approve of. In its decision, the Court stated as follows:

But in holding that as a prerequisite to any relief each appellant must indicate to the Union the specific expenditures to which he objects, the Court of Appeals ignored the clear holding of Allen. As in Allen, the employees here indicated in their pleadings that they opposed ideological expenditures of any sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or

his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Id. at 241 (emphasis in original).

The fact that the Keller decision relief heavily on the Court's previous Abood decision makes it evident that Abood is applicable to compulsory bar associations such as The Florida Bar. Your June 19, 1990 letter to me confirms this by acknowledging that unified bar associations have to deal with their "Abood obligations."

The Abood decision, as quoted above, makes it clear that dissenting members, such as myself, cannot be compelled to indicate to the compulsory organization the specific expenditures to which they object. However, contrary to this clear language in Abood, The Florida Bar requires dissenting Bar members to, "within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue." See Rule 2-9.3(c) of The Rules Regulating The Florida Bar. This requirement, in light of both Abood and Keller, is unconstitutional and must be deleted.

My June 14, 1989 letter to you in which I "demand[ed] that no portion of my compulsory bar dues be used directly or indirectly to fund or support any legislative lobbying by or on behalf of The Florida Bar" comports with the express language



of the Abood decision. Once again, I renew this demand and further demand that these dues be sent to me immediately.

Sincerely yours,

/s/

David P. Frankel

cc: Frederick J. Bosch, Esq.  
Joseph W. Little, Esq.  
Herbert R. Kraft, Esq.

APPENDIX C

[SEAL]

**THE FLORIDA BAR**  
650 APALACHEE PARKWAY  
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.  
EXECUTIVE DIRECTOR

904/561-5600  
FAX 904/222-3729

July 26, 1990

Mr. David P. Frankel  
4336 Garrison Street, N.W.  
Washington, D. C. 20016

Re: Florida Bar Legislative Activities

Dear Mr. Frankel:

At its regular meeting during July 18 & 19, the Board of Governors of The Florida Bar received a preliminary report of its Legislation Committee regarding its consideration of your May 15, 1990 request for possible amendments to the Bar's legislative objection procedure as to venue and cost issues.

At this time, in view of the pending status of the second Gibson appeal before the Eleventh Circuit Court of Appeals, and the petition for certiorari before the United States Supreme Court in the second Schwarz case, the Legislation Committee and other committees resolved to conduct a full review of Florida Bar legislative activities in light of the Keller opinion. It was felt that proposed Bar rule amendments might await the outcome of these ongoing cases due to Board preference for one comprehensive change in our procedures. Again, at that time, this was considered to be an appropriate disposition of your May 15 inquiry,

especially if partial dues rebates continue to be the norm in the Bar's administration of Rule 2-9.3.

Following that Board action, on July 23, 1990 the Eleventh Circuit Court of Appeals upheld our legislative objection procedures, with the one exception that our Rule 2-9.3 interest calculations must be made as of the date that payment of a member's Bar dues was received by this organization. Consequently, I anticipate some interim amendments to our rule in view of this holding. Otherwise, the issues raised in your most recent July 18 correspondence as to The Florida Bar's Aboud obligations (as the United States Supreme Court refers to them in Keller) were disposed of in the Eleventh Circuit's ruling in this week's Gibson opinion.

As noted previously, I encourage you to provide the Bar with any specific thoughts you might care to share regarding the venue and cost issues of our objection procedures. I am sure that the activities of our Legislation Committee, in particular, would benefit from any views that you might wish to express regarding particular amendments to our governing procedures.

Cordially,

/s/

John F. Harkness, Jr.

JFHjr:m1W13

cc: Mr. William F. Blews, Chairman, Legislation Committee

APPENDIX D

4336 Garrison Street, N.W.  
Washington, D.C. 20016  
June 14, 1989

Mr. John F. Harkness, Jr.  
Executive Director  
The Florida Bar  
Tallahassee, Florida 32301-8226

Re: Legislative Lobbying

Dear Mr. Harkness:

Enclosed is my 1989-90 annual dues payment (\$140.00) for The Florida Bar. I hereby demand that no portion of my compulsory bar dues be used directly or indirectly to fund or support any legislative lobbying by or on behalf of The Florida Bar.

Sincerely yours,

/s/

David P. Frankel  
Florida Bar Number 311596

Enclosure

APPENDIX E

4336 Garrison Street, N.W.  
Washington, D.C. 20016  
August 8, 1990

Mr. John F. Harkness, Jr.  
Executive Director  
The Florida Bar  
Tallahassee, Florida 32301-8226

Re: Legislative Lobbying

Dear Mr. Harkness:

Enclosed is my 1990-91 annual dues payment (\$190.00) for The Florida Bar. I hereby demand that no portion of my compulsory bar dues be used directly or indirectly to fund or support any legislative lobbying or amicus filings by or on behalf of The Florida Bar.

Sincerely yours,

/s/

David P. Frankel  
Florida Bar Number 311596

Enclosure



**APPENDIX B**

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**ORDER OF THE SUPREME COURT OF FLORIDA**

**JANUARY 4, 1991**

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# Supreme Court of Florida

FRIDAY, JANUARY 4, 1991

THE FLORIDA BAR

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CASE NO. 76,853

RE: DAVID P. FRANKEL

\*\*

Motion to Join as Co-Petitioner filed by Joseph W.  
Little is hereby granted.

A True Copy

C

cc: David P. Frankel, Esquire  
Joseph W. Little, Esquire  
John F. Harkness, Jr., Esquire

TEST:

/s/

[SEAL]

Sid J. White

Clerk Supreme Court

APPENDIX C

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RESPONSE OF THE FLORIDA BAR  
TO AMENDED PETITION OF DAVID P. FRANKEL  
FILED ON JANUARY 28, 1991

*Florida Bar Re David P. Frankel,*  
No. 76,853 (Fla. filed Oct. 29, 1990)

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

IN RE: David P. Frankel

Case No. 76,853

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RESPONSE OF THE FLORIDA BAR  
TO AMENDED PETITION OF DAVID P. FRANKEL

THE FLORIDA BAR ("the Bar") hereby files this response to the amended petition of David R. [sic] Frankel regarding legislative activities of this organization, and respectfully states:

The Petitioner in this action questions the propriety of eight matters formally advocated by The Florida Bar as official legislative positions of this organization. Petitioner argues that these positions violate standards adopted by this Court, and that the Bar should be enjoined from lobbying such issues in the legislative arena. Petitioner further seeks a declaration as to the unconstitutionality of criteria adopted by this Court to assist in determining whether certain topics are appropriate for the Bar's active legislative involvement.

The bulk of Petitioner's argument is premised on this Court's October 1989 opinion in The Florida Bar re Schwarz, 552 So.2d 1094 (Fla. 1989) cert. den. 111 S.Ct. 371 (1990) ["Schwarz II"]. Since that case was decided, the federal constitutional implications of political and ideological activities of the unified bar have been addressed by the United States Supreme Court in Keller v. State Bar of California, \_\_\_\_ U.S. \_\_\_\_, 110 S.Ct. 2228 (1990). Additionally, the specific procedures for member dissent from Florida Bar legislative activities per Bar Rule 2-9.3 have now

been reviewed by lower federal courts, in Gibson v. The Florida Bar, 906 F.2d 624 (11th Cir. 1990) petition for cert. filed (U.S., Jan. 17, 1991) (No. 90-1102) ["Gibson II"].

RECENT UNITED STATES SUPREME COURT  
ACTION HAS CLARIFIED THE FIRST  
AMENDMENT IMPLICATIONS OF POLITICAL  
ACTIVITIES OF THE INTEGRATED BAR

Rendition of Keller v. State Bar of California on June 4th of last year finally clarified the federal constitutional implications of certain uses of mandatory dues money within the integrated bar.

Keller involved a member challenge of various political activities of the integrated State Bar of California, all principally financed through the use of compelled membership dues. Those questioned matters, as listed by the Court, included: lobbying of the state legislature and other governmental agencies; the filing of amicus curiae briefs in pending cases; the conduct of an annual Conference of Delegates at which issues of current interest were debated and resolutions approved; and the presentation of a variety of education programs.

Consistent with the flow of lower court pronouncements, the Keller Court analogized the integrated bar to the compulsory union/agency shop environment. That opinion held the use of mandatory dues to financially underwrite a bar's political activities is violative of dissenting members' First Amendment rights in certain, but not all, instances. Reciting its ruling in the labor union case of Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977), the Court stated:

Abood held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's

interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Keller, 110 S.Ct. at 2236.

Then, in revisiting its only other pronouncement on the integrated bar—Lathrop v. Donohue, 367 U.S. 820 (1961)—the Court concluded:

Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." Lathrop, 367 U.S., at 843, 81 S.Ct., at 1838 (plurality opinion).

Keller, 110 S.Ct. at 2236.

The U.S. Supreme Court gave additional guidance as to how an integrated bar might properly address the First Amendment implications of Keller, as premised on Abood and related labor cases. Application of those cases involves a determination of the proportionate share of compulsory membership dues that dissenting members may be required to contribute toward support of authorized bar programs that are otherwise constitutional for First Amendment purposes.

For such "proportionate share" determinations, Keller endorsed the approach approved in Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986). That opinion enunciated the constitutional standards for a union's collection, as exclusive bargaining agent for members and non-members, of proportionate share payments from non-union members who benefited from union representation. The Court said such

collection must include: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Chicago Teachers, 475 U.S. at 310.

Commenting further on this methodology, the Keller Court observed:

In Teachers v. Hudson, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), where we outlined a minimum set of procedures by which a union in an agency shop relationship could meet its requirement under Abood, we had a developed record regarding different methods fashioned by unions to deal with the "free rider" problem in the organized labor setting. We do not have any similar record here. We believe an integrated bar could certainly meet its Abood obligation by adopting the sort of procedures described in Hudson. Questions as to whether one or more alternate procedures would likewise satisfy that obligation are better left for consideration upon a more fully developed record.

Keller, 110 S.Ct. at 2237 - 8.

THE EIGHT LEGISLATIVE POSITIONS IN QUESTION  
ARE WITHIN ALLOWABLE SUBJECT AREAS OF  
POLITICAL INVOLVEMENT OF THE FLORIDA BAR

The Florida Bar's legislative programming has been shaped by state Supreme Court-promulgated rules and case law since integration of the Bar in 1950. Generally speaking, pertinent court opinions have reflected varying pronouncements on either the Bar's corporate authority or constitutional limitations in the legislative arena: Gibson II; Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986) ["Gibson I"]; Schwarz II; The Florida Bar re. Schwarz, 526 So.2d 56 (Fla. 1988) ["Schwarz I"]; The Florida

Bar re. Amend. to Rule 2-9.3, 526 So.2d 688 (Fla. 1988); In re Amendment to Integration Rule of The Florida Bar, 438 So.2d 213 (Fla. 1983); and In re Florida Bar Board of Governors' Action, 217 So.2d 323 (Fla. 1969).

In Schwarz I the Supreme Court of Florida considered a petition which questioned "the legality, propriety, scope and procedures, if any, through which this Court may exercise political power" through The Florida Bar. Schwarz I, 526 So.2d at 56. As a result of that action, this Court commissioned a review of the Bar's legislative program by Florida's Judicial Council. Recommendations from that Council were subsequently approved and adopted by this Court "as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar." Schwarz II, 552 So.2d at 1098. This Court noted

In seeking to define the administration of justice and the advancement of the science of jurisprudence, the Council recommended that the following subject areas be recognized as clearly justifying legislative activities by the Bar.

- (1) Questions concerning the regulation and discipline of attorneys;
- (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
- (3) increasing the availability of legal services to society;
- (4) regulation of attorneys' client trust accounts; and
- (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

Special Report on Legislative Activities, supra, at 9. The Council also recommended that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with



when the legislation appears to fall outside of the above specifically identified areas."

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Id. at 9-10.

Schwarz II, 552 So.2d at 1095.

Petitioner seeks to make the Bar accountable, solely under Schwarz II, for the propriety of eight particular legislative positions adopted by the Board of Governors in October 1990. The questioned topics are a part of 14 separate recommendations of The Florida Bar Commission for Children, a prestigious interdisciplinary group which, for two years, has undertaken a substantial and in-depth examination of children's issues, societal problems and the role of lawyers in contributing to the solution of these problems. These topics were also a part of this organization's legislative agenda in the 1988-90 biennium but were formally "sunsetting" in July 1990 in accordance with official Bar policy. Legislative Policy and Procedure 9.11(d), 64 Fla.B.J. 128 (Sept. 1990).

As formally noticed per Bar Rule 2-9.3 in the October 15, 1990, issue of The Florida Bar News, the challenged topics include:

- a. Expansion of the women, infants and children (WIC) program.
- b. Extension of Medicaid coverage for pregnant women.
- c. Full immunization of children.

- d. Establishing children's services councils.
- e. Family life and sex education/teen pregnancy prevention.
- f. Increasing Aid to Families with Dependent Children.
- g. Enhanced child-care funding and standards.
- h. Creation of children's needs consensus estimating conference.

The Florida Bar News, Oct. 15, 1990, at 4, col. 2.

Each of these issues was more fully described within a special issue of The Florida Bar Journal which predated the Board's action by some seven months: See Middlebrooks & Streit, "Lawyers Cannot Remain Silent," 64 Fla.B.J. 10 (Mar. 1990).

Petitioner proclaims that none of these legislative positions meets any of the five Schwarz II guidelines that would clearly justify Bar legislative involvement. He makes no argument that these matters are ultra vires in the corporate sense, nor should he in view of this Court's authorization for the Bar to "[e]stablish, maintain, and supervise . . . [p]rograms for promoting and supporting the Bar's public service obligations and activities . . ." Rules Regulating The Florida Bar 2-3.2(c)(8). Yet, if such advocacy must be judged by the three subordinate criteria in Schwarz II, the challenged topics still appear to be well within those guidelines.

As to the first criterion, Petitioner readily concedes the great public interest of these issues. With regard to the second criterion, the impressive and convincing presentation of these political priorities and other moral concerns of the legal profession—evidenced by a special Journal compendium and by the ultimate legislative passage of many of these measures—verifies the specialty of training and experience within this profession to more than suitably evaluate and explain these matters.

As stressed in the comments of Bar leadership, such "advocacy and protection for children that only lawyers can provide" is "one of the highest callings of our profession" in keeping with "the highest ideals of professionalism and the role of lawyers in our society as counselors and healers." Zack, "To Volunteer to Help is to Light a Candle of Hope," 64 Fla.B.J. 4 (Mar. 1990).

The general charge to The Florida Bar Commission for Children further explains:

A major priority of The Florida Bar during the upcoming year will be children's issues. The Florida Bar Commission for Children, composed of judges, lawyers, medical doctors, business executives, legislators, and community leaders, will recommend legislation for inclusion in The Florida Bar legislative program, as well as changes in court rules and legal practice. The Commission will also explore sources of funding for children's programs. . . .

The leadership of The Florida Bar believes that a greater investment of time and money spent on children in their early years will result in better, safer, more productive lives for all Floridians. The Commission's responsibility is to work to translate this belief into reality through utilization of the time and resources of Florida lawyers and cooperation with other groups and professions.

The Florida Bar, General Orientation Materials to The Florida Bar Commission for Children 1 (July 1989) (available at Florida Bar Headquarters)

None other than our current Governor, in the special Journal discussion of children's issues, unequivocally proclaimed: "Certainly our profession bears a special responsibility to

represent unprotected and defenseless children." Chiles, "Florida's Children as Human Capital," 64 Fla.B.J. 8 at 9 (Mar. 1990).

Pointed language in the preamble to this Bar's Rules of Professional Conduct regarding a lawyer's responsibilities, unconditionally states that "[a]s a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession." Rules Regulating The Florida Bar, Ch. 4.

In weighing the propriety of advocating these questioned topics the Bar's Legislation Committee chairman observed, "Who better to speak for those who cannot speak, than lawyers for children?" The Florida Bar News, Nov. 15, 1990, at 1, col. 2.

The training and experience of lawyers to evaluate and explain issues affecting children would seem heavily underscored by the 1984 action of the American Bar Association which read:

BE IT RESOLVED, That the American Bar Association urges the members of the legal profession, as well as state and local bar associations, to respond to the needs of children by directing attention to issues affecting children including, but not limited to: (1) the preservation of children's legal rights; (2) the needs of children who have no effective voice of their own in government; (3) drug and alcohol abuse among children; (4) establishment of character, citizenship, parenting skills, and child safety programs in public education; (5) implementation of statutory and programmatic resources to meet the health and welfare needs of children; (6) missing and molested children; and (7) establishment of guardian ad litem programs.

A.B.A. H. Res. 103A, 1984 Midyr. Mtg. (1984).

Inspiration for that ABA pronouncement, in part, stemmed from the salutary [sic] accomplishments of The Florida Bar's



Committee on the Legal Needs of Children. That group, whose mission is now incorporated within the Commission for Children, was created in 1983 and represented the first interdisciplinary children's committee sponsored by a state bar. The activities of that predecessor committee have been well chronicled within this Bar, long known by this Court, and never questioned.

Indeed, it would seem indisputable that children—wards of the court—are the responsibility of lawyers as officers of the court. In the context of reviewing juvenile dependency proceedings in our state, this Court recited the conclusions of one of its own ad hoc study committees which observed, "a greater investment of time by lawyers in the system is necessary, if we are to protect the important rights of the children and families whose lives come under the control of the system." The Florida Bar In re Advisory Opinion HRS Nonlawyer Counselor, 547 So.2d 909 at 910 (Fla. 1989).

The foregoing should easily support the involvement of The Florida Bar in these matters under the second prong of Schwarz II's three additional criteria—and even arguably suggest "clear justification" for advocacy of such matters due to their relationship to the "ethics" and "integrity" of the legal profession under the fifth guideline of that opinion.

And, as to Schwarz II's third criterion, regardless of Petitioner's dismissal of (1) any nexus between the rights affected by these legislative issues and (2) some reason that unprotected children may come into contact with the judicial system, that view is disputed by one of Florida's premier prosecutors:

As I analyze the background of people who commit crime, I see recurring patterns: a child born into poverty, raised by a single parent in substandard, squalid housing without adequate health care, left to wander the streets after school, ignored by a parent who has plunged into drugs, truant at nine years of age, a dropout at 13, a delinquent at 14, and in prison at 18.

Each scenario is different, but common sense dictates that unless we make a major investment in our children up front, we will pay far more for prisons and the cost of crime by the time these children turn 18.

Reno, "To Protect Our Children is to Prevent Crime," 64 Fla.B.J. 16 (Mar. 1990).

Press accounts of the Bar's Legislation Committee deliberations on these measures highlight similar debate on this identical concern. The Florida Bar News, Nov. 15, 1990, at 2, col. 3.

The preceding analysis should therefore confirm the propriety of the Bar's involvement in these legislative matters under the application of the three additional Schwarz II criteria. Still, Schwarz II further admonishes the Bar to "exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar." Schwarz II, 552 So.2d at 1097.

Following the extensive Journal discussion of these topics and their formal notice for member reaction, only nine objections against these specific measures—from a membership of 45,166—were filed under the provisions of Bar Rule 2-9.3. During the 1988-90 legislative biennium, these issues garnered but three member objections. All have been paid or authorized partial dues rebates from the Bar. Further, that Journal presentation chronicled some \$27,000 in voluntary contributions from 526 lawyers toward a separate Florida Bar Children's Fund—and donations increased appreciably after that publicity. These reports hardly signal any deep division on these measures that bear on the ethics and integrity of our legal profession.

In sum, The Florida Bar would maintain that the eight legislative positions challenged by Petitioner are appropriate when considered against the standards adopted by this Court in



Schwarz II. Consequently, no order should issue, pendente lite or thereafter, enjoining The Florida Bar from engaging in any lobbying activities pertaining to these issues.

ADDITIONAL CRITERIA OF THIS COURT  
FOR DETERMINING ACCEPTABLE LEGISLATIVE  
ACTIVITIES OF THE FLORIDA BAR ARE VALID  
UNDER THE UNITED STATES CONSTITUTION

Petitioner further seeks from this Court a declaration that the three "additional criteria" adopted in Schwarz II are violative of the First and Fourteenth Amendments to the United States Constitution, both in their express language and as applied.

The Bar notes the uniqueness of this additional request, filed pursuant to this tribunal's declaration that "any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with the Court" [Schwarz II, 552 So.2d at 1097] and the authorization of "injunctive actions seeking to prevent unauthorized bar activities and expenditures" [The Florida Bar re Amend. to Rule 2-9.3, 526 So.2d at 689]. These cases say nothing on the issue of awarding attorneys' fees to a member-objector, and such relief would seem totally inappropriate in the event of failure to prevail in such proceedings or the assertion of a nonmeritorious claim.

If Schwarz II is premised on federal constitutional considerations, it must certainly be reconciled with the Keller holding. Nevertheless, the five primary guidelines in Schwarz II seemingly fit squarely within Keller's dual standard for the uses of compulsory Bar dues. Interestingly, the argument for issuance of a writ of certiorari to the United States Supreme Court in Schwarz II, made personally by Mr. Schwarz, acknowledged that this Court's five guidelines "are appropriate under Keller." Petitioner's Supplemental and Reply Brief in Support of Petition for Writ of Certiorari at 7, Schwarz II.

If, however, Schwarz II was meant to be an interpretation of this Bar's chartered purposes, the observation best said by the Eleventh Circuit panel in Gibson I has great significance:

Aboud specifically noted that the union was free to politicize on any issue of interest to that group. See 431 U.S. at 235, 97 So.Ct. at 1799. Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. Id. Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of **dissenting** members.

Gibson I, 789 F.2d at 1570 (footnote omitted) (emphasis in original; boldface emphasis added).

Certainly The Florida Bar desires to speak as a group on any issue it is authorized by this Court to advocate—and will accommodate member dissent in the process. With regard to this point, the Bar would maintain that the Schwarz II opinion reads much like another discussion of this organization's corporate authority in the political arena, primarily influenced by provisions in the Bar's charter document and by consideration of basic member relations concerns. Aside from a singular reference to the Judicial Council's preliminary conclusions as to the constitutionality of general Bar lobbying [552 So.2d at 1095], only Justice McDonald's dissenting opinion in Schwarz II even mentions the First Amendment [552 So.2d at 1098]. Concern over The Florida Bar's delegated authority is further indicated by this Court's extensive references, in Schwarz I, to the Supreme Court of New Hampshire's resolution of that state bar's advocacy role:

The court noted that the issue was whether or not the board's decision to oppose tort reform was inconsistent with the powers and authorities conferred upon the bar association. The New Hampshire Court commented that it "is obligated to interpret the limits on bar activities so as to preclude the first amendment infringement that would result if the Association were to take positions on issues outside the scope of those responsi-

bilities that justify compelling lawyers to belong to it.”  
[In re Chapman, 128 N.H.24, 509 A.2d 753 (1986)] at  
31, 509 A.2d at 758.

Schwarz I, 526 So.2d at 58.

The guidelines in Schwarz II would appear to be a restrained pre-Keller effort by this Court to redefine The Florida Bar’s chartered authority, done with an appreciation of the dynamic nature of this issue within the federal courts and throughout the integrated bar community: Schwarz I, 526 So.2d at 57, n. 4. The three Schwarz II criteria, if confirmed as pronouncements of The Florida Bar’s range of corporate authority in the political arena, present absolutely no federal constitutional question, regardless of their scope, provided member dissent is accommodated consistent with Chicago Teachers for those issues advocated beyond Keller’s two core areas. Nor is injunctive relief appropriate in this instance.

The Bar submits that an appropriate dissent mechanism was in place to protect Petitioner and all its members—that the three additional criteria in Schwarz II are a fully constitutional recitation of this organization’s authorized range of political advocacy beyond issues of lawyer regulation and the delivery of legal services, per Keller. And, because of such available relief for dissenting Bar members, this range of activity should be accorded an interpretation broad enough to authorize the legislative activity at issue in this case.

Most importantly, if the logic of the Supreme Court of New Hampshire in Chapman still influences any application of the Schwarz II rationale, this Court is certainly no longer obligated to construe the corporate limits of The Florida Bar’s political activities in a manner identical to First Amendment parameters. Given the clarity of Keller as to the constitutional uses of compulsory dues vis-a-vis member objection, and the protection of Chicago Teachers in order to accommodate such dissent, this Court may confer on The Florida Bar the utmost power and authority it can delegate in the legislative arena.

THERE IS NO PROCEDURE PROMULGATED BY  
THIS COURT OR ANY CONSTITUTIONAL  
IMPERATIVE THAT REQUIRES THE FLORIDA  
BAR TO RECOGNIZE A GENERAL OBJECTION TO  
ANY OF ITS LEGISLATIVE ACTIVITIES

Petitioner finally seeks this court to require The Florida Bar to recognize “the established right” of dissenting members to state general objections to The Florida Bar’s lobbying activities, and to provide dissenters with refunds of all compulsory dues used for legislative lobbying.

Petitioner asserts that the past decisions of this Court and the most recent federal court rulings on this point are contrary to “clear precedent” from the United States Supreme Court. In support of that thesis, Petitioner selectively cites from Abood, which predates Chicago Teachers by some nine years. Prior to the holding in Chicago Teachers that a union’s collection of proportionate share payments must include “an adequate explanation of the basis for the fee,” it was quite logical for the Abood Court to have been sensitive to a dissident’s difficulty in identifying “the specific expenditures” [97 S.Ct. at 1802] for possible objection, and in monitoring “all the numerous and shifting expenditures” [97 S.Ct. at 1803] that a union might incur. Now, however, a member objection procedure which comports with Chicago Teachers should vitiate that argument—especially when the formal notice provisions of that procedure include specificity as to contestable matters and substantially reduce any burden of monitoring the organization’s political activities.

Absent any clear Supreme Court pronouncement on the general objection issue since Chicago Teachers, the Eleventh Circuit addressed the precise point raised by Petitioner in the Gibson II opinion.

Gibson next contends that the Bar’s procedures impermissibly require dissenting members to object on an issue-by-issue basis, thus forcing them to identify their



own political positions. The Bar responds that members need only make a generalized objection that a given issue is not closely enough related to the Bar's purposes to justify an expenditure of compulsory dues. The Bar claims that such an objection does not impermissibly require objectors to disclose their own position regarding the issue. We agree.

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." Chicago Teachers, 475 U.S. at 306, 106 S.Ct. at 1075 (citing Abood, 431 U.S. at 239-40 & n. 40, 97 S.Ct. at 1801-02 & n. 40). This burden "is simply the obligation to make his objection known." Id. 475 U.S. at 306 n. 16, 106 S.Ct. at 1075 n. 16. The affirmative objection requirement here is within the scope of this obligation. It merely requires the objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue. We therefore reject Gibson's challenge on this point.

Gibson II, 906 F.2d at 632.

Rejection of that challenge seemed hardly inconsistent with the Eleventh Circuit's earlier ruling in the Gibson I litigation although Petitioner is even more selective in his references to a footnote within that opinion. In that case, although the Court indicated understandable concern over the First Amendment protection of a dissident Bar member's right not to disclose his beliefs, the Court observed—in the very passage cited by Petitioner—that "the difficult task of discerning proper Bar position issues could be avoided by. . . (2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying." Gibson I, 798 F.2d at 1570 n. 5 (emphasis added).

That holding and all others on the subject otherwise sanction a mandatory membership organization's use of compulsory dues for political or ideological activities germane to the group's basic purposes, member dissent notwithstanding. And, when dissent must be accommodated with regard to non-germane matters, applicable case law acknowledges the necessity of a somewhat focused objection. Petitioner cites from Abood but, again, seemingly overlooks the significance of his own authority, which observed: "As in Allen [Railway Clerks v. Allen, 373 U.S. 113 (1963)], the employees here have indicated in their pleadings that they opposed ideological expenditures of any sort that are unrelated to collective bargaining." Abood v. Detroit Bd. of Education, 431 U.S. 209 at 241 (emphasis in original; boldface emphasis added).

Yet Petitioner contends in this action, as he has done in his written communications to The Florida Bar, that no portion of his compulsory dues be used to fund any legislative lobbying whatsoever. The correspondence shared with the Court as Appendices D & E to the Amended Petition does not express Petitioner's limited opposition to that lobbying unrelated to the Bar's core functions. Instead, Petitioner seeks a complete bye on supporting any advocacy of the integrated Florida Bar which, as Justice Terrell observed, is "the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which every member is obliged to bear his portion of the responsibility." Petition of Florida State Bar Association, 40 So.2d 902 at 904, (Fla. 1949).

That original notion has continuing significance with respect to the core functions of today's integrated bar. As the Keller Court underscored:

The plan established by California for the regulation of the profession is for recommendations as to admission to practice, the disciplining of lawyers, codes of conduct, and the like to be made to the courts or the legislature by the organized bar. It is entirely appropriate that all of the lawyers who benefit from the unique status of



being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort.

Keller, 110 S.Ct. at 2235.

Petitioner asserts that, "despite numerous requests, the Bar has never explained in any detail to Petitioner why the Bar will not recognize Petitioner's general objection to its legislative activities." Yet, at least seven separate responses from the Bar's executive director to Petitioner essentially reiterate the previous argument herein, where it is noted that pertinent case law authorizes the use of compulsory dues on topics germane to the Bar's core purposes, and that this Court's adoption of a member objection procedure in Bar Rule 2-9.3 contemplates objections to specific legislative positions.

In the interest of brevity, the Bar's direct response to Petitioner's August 8, 1990 and June 14, 1989 correspondence (Petitioner's Appendices E & D, respectively), plus one of several objection letters, are attached to this response as Respondent's Appendices A, B & C respectively. Petitioner's demands for a free ride on even the most basic matters of Bar business is contrary to all applicable precedent.

A RESOLUTION OF THE INSTANT PETITION MAY  
INVOLVE COLLATERAL ISSUES OF SIGNIFICANCE TO  
THE LEGISLATIVE ACTIVITIES OF THE FLORIDA BAR

These comments only address the matters directly raised by the Amended Petition in this case. However, it should be noted that Bar Rule 2-9.3, regarding member objections to legislative activity of The Florida Bar, is presently before this Court (Case No. 76,853 [sic]) for various amendments resulting from the Gibson II ruling, Schwarz II and prior commentary from the Petitioner in this instant action. Mr. Frankel has already filed

additional comments in that case, requesting oral argument as well.

The Bar would respectfully submit that, if procedural aspects of this organization's legislative activities may be impacted in a resolution of the instant petition, that this related case be considered in conjunction with this matter to whatever degree is deemed necessary. Should a formal notice to consolidate these actions be in order, the Bar will formally do so when appropriate; otherwise, no objection is expressed against such consolidation sua sponte by this Court.

CONCLUSION

The Florida Bar respectfully submits that the "additional criteria" of Schwarz II and the legislative positions at issue in this action are acceptable and constitutional under controlling law, that the injunctive relief and Bar Rule revisions sought in this case are inappropriate, and that no additional relief or costs are merited in this matter.

Respectfully submitted,

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By: /s/  
John F. Harkness, Jr.  
Florida Bar #0123390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: David P. Frankel, 4336 Garrison Street, N.W., Washington, D.C. 20016 and Joseph W. Little, 3731 N.W. 13th Place, Gainesville, Florida 32605, by mail, this 28 day of January, 1991.

/s/  
John F. Harkness, Jr.

Exhibit A-1

[SEAL]

**THE FLORIDA BAR**  
650 APALACHEE PARKWAY  
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.  
EXECUTIVE DIRECTOR

904/561-5600  
FAX 904/222-3729

August 20, 1990

Mr. David P. Frankel  
4336 Garrison Street, N.W.  
Washington, D. C. 20016

Re: The Florida Bar Legislative Activities

Dear Mr. Frankel:

This letter acknowledges receipt of your 1990 Florida Bar dues in full and further responds to your August 8 request that no portion of your compulsory dues "be used directly or indirectly to fund or support any legislative lobbying or amicus filings by or on behalf of The Florida Bar."

Our previous exchanges of correspondence noted the recent federal court opinions in the case of Keller v. State Bar of California and the latest ruling in the continuation of Gibson v. The Florida Bar. Based on these rulings and the opinion of counsel, The Florida Bar presently views its dues rebate procedure under Bar Rule 2-9.3 as an acceptable method for dealing with member dissent regarding political activities of this organization. Otherwise, our governing board is engaged in an ongoing review of The Florida Bar's full programming in light of these recent federal opinions.

Both Gibson and Keller require a member dissent procedure allowing possible rebate of mandatory dues money directed at the advocacy of certain political or ideological issues, but otherwise allow the Bar's use of such funds in connection with any topic germane to the Bar's goals of regulating the legal profession and improving the quality of legal services, member dissent notwithstanding. The Gibson opinion specifically sanctioned Bar Rule 2-9.3 which contemplates your full payment of outstanding dues, with a subsequent opportunity for timely objection to legislative positions of The Florida Bar once they are formulated and officially published for appropriate member comment. Consequently, under our present administration of Rule 2-9.3, The Florida Bar does not recognize any generalized objection to unspecified legislative activities such as those raised in your August 8 correspondence.

Further, my July 26 correspondence [sic] to you was meant to stress that the Board of Governors may immediately consider certain amendments to Rule 2-9.3 based on the remand of the latest Gibson cases, and other suggested changes resulting from the second Schwarz opinion. Nevertheless, your longstanding concerns regarding venue and cost issues of any Rule 2-9.3 arbitration proceeding remain topical—although I cannot forecast whether they would be immediately acted upon by the Board of Governors at its October 3-6 meeting following Legislation Committee consideration.

Because of ongoing review of various Keller and Gibson issues, I again encourage you to provide the Bar with any specific thoughts you might care to share regarding any aspect of our objection procedure. At its September 5 and October 3 meetings, our Legislation Committee may finalize any suggested rule revisions deemed necessary by recent case developments; your suggested revisions may be worthwhile additions to any rewrite submitted to the Supreme Court of Florida for final adoption. In any event, our deliberations would benefit from any views that you might wish to express regarding particular amendments to our governing procedures.

Cordially,

John F. Harkness, Jr.

JFHjr:mlM18

Enclosures



Exhibit B-1

[SEAL]

**THE FLORIDA BAR**  
650 APALACHEE PARKWAY  
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.  
EXECUTIVE DIRECTOR

904/561-5600  
FAX 904/222-3729

June 23, 1989

Mr. David P. Frankel  
4336 Garrison Street, N.W.  
Washington, D.C. 20016

Dear Mr. Frankel:

This letter is to formally advise you of action taken on your proposed resolution concerning legislative activities of The Florida Bar, considered during the June 16 General Assembly proceedings of our 1988-89 Annual Meeting. I will also address the comments contained in your June 1 and 2 letters dealing with this topic and your most recent legislative objections. Finally, I shall respond to your June 14 correspondence which accompanied your 1989-90 annual dues payment.

At last week's convention, participants at the General Assembly voted against the resolution officially noticed in the June 1, 1989 edition of The Florida Bar News. Votes were cast by having attendees stand up, for or against the measure. Because of the significant disparity in pro and con votes, no formal tally was taken. The chair ruled that the measure was defeated, without additional challenge. Consistent with last year's action and the recent vote of our Executive Committee, all proxies were ruled out of order.

Your June 1 comments regarding the Executive Committee's role in our legislative activities are noted. Bar Rule 2-3.12 and The Florida Bar's Legislative Policy and Procedure recognize the necessity of Executive Committee action in lieu of our Board of Governors during an ongoing legislative session. Composition of the Executive Committee is presently sanctioned by Bar Rule 1-4.3. These provisions may be reconsidered by our Board upon review of your correspondence, otherwise Bar Rules allow for suggested amendments to our charter document by individual members if that is a course of action you care to pursue.

Your observation regarding venue and costs of any arbitration proceedings under Bar Rule 2-9.3 have been noted in previous correspondence. Similarly, the propriety of a general objection has been discussed in several letters between us. I acknowledge those comments again. Otherwise, our file reflects a recurring dialogue in which the Bar's position on these issues has been shared with you. These issues presumably are now under consideration by the Supreme Court of Florida in the Schwarz case. I suggest you await further guidance from that tribunal, as the Bar is doing. Consequently, your June 14 request for remission of dues is considered inappropriate.

Additionally, I refer you to The Florida Supreme Court's June 2, 1988 opinion for guidance on the finality of Rule 2-9.3 arbitration proceedings. A photocopy of that case is enclosed for your review since you note that it was omitted from my May 24 correspondence. I assume you have been provided this case in all previous acknowledgements of your past legislative objections.

You further inquire about Legislative Positions 14-18. Copies of the Bar News editions containing the official notices of these positions are enclosed. Under our interpretation of Rule 2-9.3, your June 2 correspondence would be considered an untimely objection to these matters. As you should recall from previous communications, however, such action will not likely affect any possible dues refund you might receive under governing policy. Until the Bar has refined a method to specifically allocate costs attributable to each legislative position, a member who objects to

a single issue may receive the full amount of dues money attributable to the Bar's entire legislative program.

Your challenge to Legislative Positions 29-31 will be formally acknowledged in separate correspondence following the deadline for objections to this group of legislative positions. I hope the foregoing is responsive to your most recent inquiries. Thank you for your continuing interest in these topics.

Cordially,

John F. Harkness, Jr.

JFHjr:dtF7

Enclosures

Exhibit C-1

[SEAL]

**THE FLORIDA BAR**  
650 APALACHEE PARKWAY  
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.  
EXECUTIVE DIRECTOR

904/561-5600  
FAX 904/222-3729

May 24, 1989

Mr. David P. Frankel  
4336 Garrison Street, N.W.  
Washington, D.C. 20016

Re: Objection to Florida Bar Legislative Positions

Dear Mr. Frankel:

This letter acknowledges receipt of your April 18, 1989 correspondence indicating your objections to those legislative positions adopted by The Florida Bar and officially noted in the April 1, 1989 issue of The Florida Bar News: specifically, positions 19-22 within that notice. Your additional challenge to positions 23 & 24 is noted but will be formally acknowledged in separate correspondence following the deadline for objections to this other group of legislative positions. Your objection to positions 1-13 is again noted and remains of record.

In accordance with Bar policy, that portion of your membership dues allocable to these contested legislative positions has been escrowed for possible repayment to you, with applicable interest, in the event any refund is deemed appropriate by the Board of Governors or an arbitration panel. A copy of the Florida Supreme Court opinion which adopted this Bar rule is enclosed for your review.

Under this policy, The Florida Bar Board of Governors shall have until June 30, 1989 to grant an appropriate refund to you or refer this matter to arbitration. You will be promptly advised of the Board's action following this latter date.

Pending implementation of a method to specifically allocate costs attributable to each legislative position of The Florida Bar, an amount equal to your pro rata support of the Bar's entire legislative program has been placed in escrow.

This amount—\$7.70 of your \$140.00 in membership dues for the current fiscal year—was calculated based upon the July 1, 1988 Bar membership in good standing of 42,974 divided into the approved July 1 legislative budget of \$330,973 as published in the April 15, 1988 issue of The Florida Bar News. The budget amount was composed of the following:

	<u>Legislation</u>	<u>Tort Review</u>	<u>Total</u>
Staff and office expense	\$189,500	\$5,000	\$194,500
Other personal service	69,000		69,000
Travel	22,212		22,212
Other expense	8,234	5,000	13,234
Internal services and administration	<u>31,301</u>	<u>726</u>	<u>32,027</u>
	\$320,247	\$10,726	\$330,973

At the conclusion of the Bar's fiscal year (June 30, 1989) and 1988-89 audit, we will be able to ascertain the actual amount of funds spent on legislation and then determine the final amount of any refund that may be due.

Your comments regarding venue for any arbitration proceeding and your request for recognition of a continuing objection to all future Bar legislative positions are noted once more. Again, the issue of venue is premature for further consideration. Otherwise, the Bar's legislative procedure does not recognize a generalized or standing objection. The policy contemplates objections to specific issues, recognizing that this organization may use

compulsory dues on any topic germane to the Bar's stated purposes: see, Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) and Bar Rule 2-9.3(e)(1).

Cordially,

John F. Harkness, Jr.

JFHjr/PFH:dtW16/X122



**APPENDIX D**

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**LETTER FROM FLORIDA BAR COUNSEL BARRY RICHARD  
TO FLORIDA BAR PRESIDENT JAMES MILLER**

**OCTOBER 17, 1990**

---

**ROBERTS, BAGGETT, LAFACE & RICHARD**  
**ATTORNEYS AT LAW**

**[Addresses and telephone numbers omitted]**

October 17, 1990

Honorable James Fox Miller  
President, The Florida Bar  
650 Apalachee Parkway  
Tallahassee, Florida 32399-2300

Dear President Miller:

You have requested my opinion regarding the following question:

Can The Florida Bar lawfully boycott a particular community in order to further certain social causes relating to the welfare of minority ethnic groups?

For the reasons stated below, it is my opinion that the answer to your question is no.

The controlling factor is that The Florida Bar is not a voluntary association. Membership and payment of dues are a compulsory prerequisite to practicing law in Florida on a continuing basis. As a result, narrow restrictions are placed upon the political and ideological activities of the Bar by both its own charter and the United States Constitution.

Article V, Section 15, of the Florida Constitution grants to the Florida supreme [sic] Court, "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Pursuant to this grant of power, the Supreme Court has adopted the Rules Regulating The Florida

Bar which imposes compulsory membership and, in Section 1-2, states the purpose of the Bar:

The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

In The Florida Bar Re Schwarz, 526 So.2d 56 (Fla. 1988) the Supreme Court held that activities of the Bar are limited to its stated purposes. The Court referred to the Judicial Council of Florida the question of the proper scope of legislative lobbying activities of the Bar. In its final report, the Council identified the following areas as being within the scope of the Bar's purpose:

- (1) Questions concerning the regulation and discipline of attorneys;
- (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
- (3) increasing the availability of legal services to society;
- (4) regulation of attorneys' client trust accounts; and
- (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

In The Florida Bar Re Schwarz, 552 So.2d 1094 (Fla. 1989), the Supreme Court adopted the recommendations of the Judicial Council as guidelines to be followed with respect to determining the scope of permissible lobbying activities. While the Council's focus was on lobbying, its conclusions were based upon an analysis of the permissible scope of the Bar's political and ideological activities in light of its stated purpose. It appears clear to me that the Bar is limited in all of its political and

ideological activities to its stated purpose as further delineated by the Council's guidelines. I cannot see how a boycott to further general social causes, regardless of how well intended, can fit within the narrow stated purposes of the Bar.

In addition to the restrictions imposed by the Florida Supreme Court, the Bar is limited in its activities by Federal Constitutional restraints. In the recent case of Keller v. State Bar of California, 58 LW 4661 (June 4, 1990), the United States Supreme Court announced First Amendment restrictions on the use of compulsory bar dues for political or ideological purposes. The decision was not limited to legislative activities. The Court noted that the California Bar "lobbied the Legislature and other governmental agencies, filed amicus curiae briefs in pending cases, held an annual conference of delegates at which issues of current interest are debated and resolutions approved, and engaged in a variety of education programs." The petitioners had alleged that through such activities the Bar had used compulsory dues "to advance political and ideological causes". The Court held that a bar cannot spend compulsory dues over a member's objections for ideological activities not germane to the purpose for which compelled association is justified. The Court found that purpose to be "regulating the legal profession and improving the quality of legal services."

Earlier, in Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986), the United States Court of Appeals for the Eleventh Circuit provided more specific guidelines. The Court held that acceptable areas of ideological activity by The Florida Bar include "(1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards." Neither the Eleventh Circuit in Gibson, nor the Florida Supreme Court in Schwarz indicated that the examples given were intended to be all-inclusive. However, both opinions made clear that the examples were intended to illustrate the nature of subjects which define the parameters of permissible Bar activity.



The essence of all the foregoing cases is that The Florida Bar is not a general social action association with the freedom to engage in any activity it chooses. There are voluntary bar associations at the local and national levels which do have that freedom. The Florida Bar does not. It derives its power to compel membership from a very circumscribed purpose and it is limited in its pursuits to fulfilling that purpose.

I do not mean to suggest that the bar is powerless to deal with ethnic abuses of or by its members. It certainly has the power to respond to such abuses when they are sufficiently connected with the Bar's core purposes. Thus, the Bar can take action to correct such abuses if they occur internally or within the judicial system. I believe it would even be permissible, for example, to decline to hold a meeting at a particular establishment if it exercised policies that restricted the ability of certain members to attend and participate in the Bar activity of such establishment, whether such policies were motivated by ethnic prejudice or otherwise. The Bar simply cannot adopt policies designed to further general social causes not reasonably related to its essential purposes.

Sincerely,

/s/

Barry Richard

BSR/FLBAR:cjm(FIBar-A)

## **APPENDIX E**

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### **LEGISLATIVE LOBBYING RULES AS PROMULGATED BY THE SUPREME COURT OF FLORIDA, EFFECTIVE MARCH 26, 1991**

*Florida Bar Re Petition to Amend Rules  
Regulating The Florida Bar -  
Bylaws 2-3.10 and 2-9.3, No. 77,656  
(Fla. March 26, 1991)*

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[Italicized text represents new rule amendments; text struck through represents original text to show deletions]

2-3.10 Meetings.

The board of governors shall hold six (6) regular meetings each year, at least one of which shall be held at The Florida Bar Center. Subject to the approval of the board of governors, the places and times of such meetings shall be determined by the president, who may make such designation while president-elect. Special meetings shall be held at the direction of the executive committee or the board of governors. Any member of The Florida Bar in good standing may attend meetings at any time except during such times as the board shall be in executive session concerning disciplinary matters, personnel matters, *member objections to legislative positions of The Florida Bar*, or receiving attorney-client advice. Minutes of all meetings shall be kept by the executive director.

2-9.3 Legislative policies.

(a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the Board meeting at which the positions were adopted.

(c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written



objection to a particular position on a legislative issue. *The identity of an objecting member shall be confidential unless made public by The Florida Bar or any arbitration panel constituted under these rules upon specific request or waiver of the objecting member.* Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

— (2) Upon the deadline for receipt of written objections, the board of governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(3) *In the event the Board of Governors orders a refund, the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow for the duration of the fiscal year and until the conclusion of The Florida Bar's annual audit as provided in rule 2-6.16, which shall include final independent verification of the appropriate refund payable. The Florida Bar shall thereafter pay such refund within thirty (30) days of independent verification of the amount of refund, together with interest calculated at the statutory rate of interest on judgments as of the date the objecting member's dues at issue were received by The Florida Bar, for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.*

(d) Composition of arbitration panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as

practicable following the decision by the board of governors that a matter shall be referred to arbitration.

The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member, and those two (2) members shall choose a third member of the panel who shall serve as chairman. In the event the two (2) members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the Board of Governors that the matter shall be referred to arbitration, The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. *Venue for any arbitration proceedings conducted pursuant to this rule shall be in Leon County, Florida, however, for the convenience of the parties or witnesses or in the interest of justice, the proceedings may be transferred upon a majority vote of the arbitration panel. The chairman of the arbitration panel shall determine the time, date and place of any proceeding and shall provide notice thereof to all parties. The arbitration panel shall thereafter confer and decide whether The Florida Bar proved by the greater weight of evidence that the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.*

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. *If requested by an objecting member who is a party to such proceedings, such party and counsel, and any witnesses may participate telephonically, the expense of which shall be advanced by the requesting party.* The decision of the arbitration panel shall

be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel shall order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the Board of Governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, *the objecting member's right to such refund shall immediately vest although the pro rata amount of the objecting member's dues at issue shall remain in escrow until paid. Within thirty (30) days of independent verification of the amount of refund, The Florida Bar shall provide such refund ~~within thirty (30) days of~~ together with interest calculated at the ~~legal~~ statutory rate of interest on judgments as of the date the ~~written objection was~~ objecting member's dues at issue were received by The Florida Bar, for the period commencing with such date of receipt of the dues and ending on the date of payment of the refund by The Florida Bar.*

(5) Each arbitrator shall be compensated at an hourly rate equal to that of a circuit court judge based on services performed as an arbitrator pursuant to this rule.

(6) The arbitration panel shall tax all legal costs and charges of any arbitration proceeding conducted pursuant to this rule, to include arbitrator expenses and compensation, in favor of the prevailing party and against the nonprevailing party. When there is more than one party on one or both sides of an action, the arbitration panel shall tax such costs and charges against nonprevailing parties as it may deem equitable and fair.

(7) *Payment by The Florida Bar of the costs of any arbitration proceeding conducted pursuant to this Rule [sic], net of costs taxed and collected, shall not be considered to be an expense for legislative activities, in calculating dues refunds pursuant to this rule.*

9  
No. 90-1102

Supreme Court, U.S.  
FILED

APR 29 1991

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, et al.,

*Respondents.*

On Writ of Certiorari from  
the United States Court of Appeals  
for the Eleventh Circuit

**BRIEF AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

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No. 90-1102

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ROBERT E. GIBSON,  
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On Writ of Certiorari from  
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for the Eleventh Circuit

---

**BRIEF AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

---

**IDENTITY AND INTERESTS OF AMICUS**

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner Robert E. Gibson. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.



PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF is submitting this brief because it believes its public policy perspective and litigation experience in the compelled dues arena (be they agency shop or state bar) will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court including amicus curiae participation in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Recently, PLF attorneys represented the petitioners in *Keller v. State Bar of California*, 495 U.S. \_\_\_, 110 L. Ed. 2d 1 (1990) (limiting the integrated bar's ability to spend objecting members' dues for political activities). Additionally PLF attorneys represented the petitioner in *Cumero v. Public Employment Relations Board*, 49 Cal. 3d 575 (1989) (limiting the use of objecting nonmembers' fees to those activities statutorily authorized in California's Educational Employment Relations Act). PLF filed a brief amicus curiae in this case supporting the grant of certiorari. PLF believes the Eleventh Circuit Court's opinion incorrectly analyzed the holdings of this Court which protect an individual's freedom of association and anonymity, resulting in objectors to the Bar's political and ideological expenditures being forced to choose between

their First Amendment right to object to nonchargeable expenditures by the Bar and their First Amendment right to remain anonymous in their associations and political beliefs.

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### OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Gibson v. The Florida Bar*, 906 F.2d 624 (11th Cir. 1990). The court held, *inter alia*, that the Florida Bar was not required to provide advance notice or reduction of dues for the proportion of dues that the Bar knew would be used for political or ideological activities; that objecting members of the Bar could be required to object on a particularized basis to each legislative policy with which they disagree; and that petitioner Gibson was not entitled to a refund of improperly collected dues.

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### SUMMARY OF ARGUMENT

The Florida Bar has established procedures to handle dissenting members' objections to Bar expenditures for political and ideological activities. The procedures, which require specific objections to each particular expenditure with which the member disagrees, violate the First Amendment guarantee of anonymous association.

This Court has long held that anonymity is a necessary corollary to the First Amendment freedom of association. Individuals have the constitutional right to

express unpopular opinions without bringing down upon themselves the wrath of the community, government, or other individuals who control some part of their lives. Attorneys in Florida are required to join the Florida Bar. But they are not required to agree with the political activities undertaken by the Bar, nor are they required to fund such activities. Moreover, they must not be required to forego the First Amendment right to anonymity to maintain the First Amendment right not to fund political activities.

The Florida Bar procedures chill protected speech. This Court has taken a commonsense approach to whether speech is chilled or not. Here, members of the Florida Bar are required to announce to the leadership of the Bar that they disagree with their policies. Florida lawyers may not practice law without the authorization of the Florida Bar. To affirm the Eleventh Circuit's decision upholding the Bar's procedures would place Florida lawyers in the position of publicly disagreeing with people who control their career in order to maintain their First Amendment rights.

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## ARGUMENT

### I

#### THE RIGHT OF ANONYMOUS ASSOCIATION IS INHERENT IN THE FIRST AMENDMENT

The Eleventh Circuit Court of Appeals decision is flawed in many respects, but the most egregious defect is that the court held as constitutional the Florida Bar's

procedure that requires members to object to each particular legislative policy with which the members disagree. This decision contravenes decades-old decisions recognizing the right of anonymous association. See *National Association for the Advancement of Colored People v. Alabama* (N.A.A.C.P.), 357 U.S. 449, 460 (1958), and *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). The particularized objection procedure violates the objector's freedom of anonymous association by forcing the objector to announce beliefs unpopular with the leadership of the Bar. Here, then, the price of exercising one's First Amendment right to object to expenditures of compelled dues for political or ideological activities is the relinquishing of one's First Amendment right to remain anonymous in one's beliefs.

#### A. This Court Has Firmly Established Anonymity as a Necessary Corollary to Freedom of Speech and Association

This Court firmly espoused the principle that the right to refrain from disclosing one's beliefs or membership in an organization is a necessary and fundamental corollary to the freedom of association illustrated in *N.A.A.C.P.* and *Bates*. This Court in *N.A.A.C.P.* stated that

"on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of

petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *N.A.A.C.P.*, 357 U.S. at 462-63.

In *Bates*, this Court elaborated further on the freedoms at stake:

"Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.

"Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. 'It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'" *Bates*, 360 U.S. at 522-23 (quoting *N.A.A.C.P.*, 357 U.S. at 462) (emphasis added; citations omitted).

Beginning with *N.A.A.C.P.*, this Court recognized the importance of protecting anonymous political activity and has repeatedly reaffirmed that the Constitution protects against compelled disclosure of political associations and beliefs. See *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (statute held unconstitutional which undertook to compel every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing any organizations to which he or she might belong).

Because compelled disclosure of affiliation with groups can seriously infringe First Amendment rights (*Buckley v. Valeo*, 424 U.S. 1, 64 (1976)), disclosure laws that significantly encroach First Amendment rights must survive exacting scrutiny, and the state must establish a relevant correlation or substantial relation between the governmental interest and the information sought through disclosure. *Id.* at 64-65. Strict scrutiny is required even if the infringement on First Amendment rights arises "not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

Virginia's highest court addressed freedom of association in *N.A.A.C.P. Legal Defense and Educational Fund, Inc. v. Committee on Offenses Against the Administration of Justice*, 204 Va. 693 (1963). In that case, plaintiffs sought to quash a discovery order that would require production of membership lists. The court noted that there

"is ample uncontroverted testimony in the record . . . to show that many persons fear a disclosure of their names as associates or supporters of appellants' activities will bring upon



them harassment, intimidation, enmity and social and economic reprisal. This is evidenced by anonymous contributions made to avoid the threatened hostility of other persons in their community. . . . One would have to be deeply insensible to the affairs of present day life, or a modern Rip Van Winkle, to fail to observe the opposition . . . to the activities of the NAACP and its affiliates." *Id.* at 697-98.

The court held that disclosure of the names of N.A.A.C.P. supporters violated the freedom of association, concluding that while the state may conduct legislative investigations to protect its legitimate interests, Virginia exceeded its power by intruding into an area of constitutionally protected right of freedom and privacy of association, *id.* at 698. The state failed to show such an overriding and compelling state interest to justify substantial abridgment of associational freedoms, which disclosure of names of donors to appellants' activities would effect. *Id.* at 702.

In *Britt v. Superior Court*, 20 Cal. 3d 844 (1978), the California Supreme Court addressed the issue of whether one must espouse an *unpopular* cause to be protected by the First Amendment freedom of association. The answer is no. Constitutional protection is afforded to the privacy interests of members of *all* politically oriented associations. *Id.* at 854.

In that case, the defendant port district did not contest the constitutionally sanctioned nature of the associational activities, but instead argued that because the discovery order at issue did not prohibit the exercise of any such activities but merely required their disclosure, the order was not vulnerable to constitutional attack. The

California Supreme Court rejected that argument, reiterating this Court's mandate that freedom of association is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id.* at 852 (quoting *Bates*, 361 U.S. at 523). The court noted that even adherence to a cause that finds general support could nonetheless "raise the ire of municipal authorities or other individuals or business entities" who have interests contrary to the position espoused. *Britt*, 20 Cal. 3d at 854.

The Sixth Circuit addressed the N.A.A.C.P. line of cases in *Marshall v. Bramer*, 828 F.2d 355 (6th Cir. 1987). The court in that case, in which the plaintiff sought to protect the membership list of the local Ku Klux Klan, followed the rules of those cases, and applied strict scrutiny:

"[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a *substantial relation between the information sought and a subject of overriding and compelling state interest*. Absent such a relation between the NAACP and conduct in which the State may have a compelling regulatory concern, the Committee has not "demonstrated so cogent an interest in obtaining and making public" the membership information sought to be obtained as to "justify the substantial abridgment of associational freedom which such disclosures will effect." " *Id.* at 359 (citing *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963)) (emphasis in original).

Protection of the freedom of anonymous association is necessary to preserve individual liberties, to increase

the dissemination of diverse viewpoints, and to promote the structural goal of wide political participation. As the Ninth Circuit observed:

"The right of those expressing political, religious, social or economic views to maintain their anonymity is historic, fundamental, and all too often necessary. The advocacy of unpopular causes may lead to reprisals—not only by government, but by employers, colleagues, or society in general. While many who express their views may be willing to accept these consequences, others not so brave or not so free to do so will be discouraged from engaging in public advocacy." *Rosen v. Port of Portland*, 641 F.2d 1243, 1251 (9th Cir. 1981).

In *Rosen*, an ordinance requiring disclosure of members of a group desiring to distribute literature in a public forum was struck down as violative of the freedom of association and the correlative right to anonymity. The circuit court maintained that because the "expression of dissident or 'unsettling' views, by its very nature, invites retaliation and oppression, the identification requirement of the ordinance presents substantial dangers of 'chill and harassment.'" *Id.* See also *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1496 (9th Cir. 1987) (holding that because of " 'the vital relationship between freedom to associate and privacy in one's association,' " the members were entitled to opt for anonymity), and *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987) (" '[o]ffensive to the sensibilities of private citizens, identification requirements . . . even in their least intrusive form, must discourage . . . participation [in the preservation and strength of the democratic ideal]' ").

## **B. Public Disclosure of Opinions Contrary to the Leadership of the Bar Will Chill Protected Speech**

This Court, while recognizing the careful scrutiny and balancing of constitutional rights that must inhere in every First Amendment case, has taken a very practical approach to analyzing the "chill" factor resulting from public disclosure of individuals' private beliefs and associations. A factual record of past harassment is not the only situation in which courts have upheld a First Amendment right of nondisclosure. The underlying inquiry must be whether a compelling governmental interest justifies governmental action that has "the practical effect 'of discouraging' the exercise of constitutionally protected political rights." *N.A.A.C.P.*, 357 U.S. at 461. This practical effect may take the form of "an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley v. Valeo*, 424 U.S. at 65. Thus, in *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968), although there was no evidence of past reprisals against contributors to the petitioner Republican Party of Arkansas, this Court held that it would be naive not to recognize that disclosure would impermissibly discourage the exercise of constitutional rights given the unpopularity of the Republican Party at that time.

One of the principal purposes of the constitutional protection of anonymous association is to free an individual to follow his conscience by ensuring that he need not " 'avoid any ties [simply because they] might displease those who control his [personal or] professional destiny.' " *Britt*, 20 Cal. 3d at 854-55. The source of the constitutional

protection of associational privacy is the recognition that, as a practical matter, compelled disclosure will often deter such constitutionally protected activities as potently as direct prohibition. *Id.* at 857.

In *Shelton v. Tucker*, 364 U.S. at 486, this Court struck down a state law requiring Arkansas teachers to disclose all organizations to which they belonged. As in *Pollard*, this Court took a commonsense approach and recognized that a chilling effect was inevitable if teachers who served at the absolute will of school boards had to disclose to the government all organizations to which they belonged. "[T]he pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.*

Similarly, in this case, each member of the Bar is required to belong to that organization, and the leadership of the Bar has the capability of greatly affecting a member's career and livelihood. A member may have valid reasons for not wanting the Bar to know that he opposes their policies. Yet under the Florida Bar procedures, such a member must either publicly declare his dissent to each particular policy he opposes or surrender his First Amendment right not to support views he does not share.

Courts review the chilling effect as a practical matter, not a theoretical one.

"In seeking to identify the chilling effect of a statute our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation." *Community-Service Broadcasting*

*of Mid-America, Inc. v. Federal Communications Commission*, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

In *Community-Service Broadcasting*, the court could not specify with any degree of certainty the precise quantity of chill which is or will be produced by the statute at issue in that case. The court said:

"Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. . . . The absence of . . . concrete evidence [of harassment] does not mandate dismissal of the claim out of hand; rather, it is the task of the court to evaluate the likelihood of any chilling effect, and to determine whether the risk involved is justified in light of the purposes served by the statute." 593 F.2d at 1118.

Similarly, the Second Circuit held that "[w]hether that chilling effect is an unconstitutional impairment of non-disclosure rights depends on an assessment of the weight of the asserted governmental interest and the degree of impairment of protected rights." *Local 1814, International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, 667 F.2d 267, 272 (2d Cir. 1981). In that case, the court emphasized that "it is appropriate in determining whether the governmental interest justifies the inevitable chilling effect of some disclosures to assess whether the disclosures will impact a group properly limited in number in light of the governmental objective to be achieved." *Id.* at 273.



Here, the Eleventh Circuit has totally disregarded the adverse effect resulting to objecting members from particularized objection. Because they fear reprisals, members will not be inclined to exercise their First Amendment right to object to the Bar's political expenditures. Furthermore, because such a minor amount of money is attached to each particular piece of legislation, the average member will likely find particularized objections too burdensome. Those members with very strong political beliefs will not necessarily be deterred by the burden of objecting, but they then run the risk of retaliation from the Bar for their unpopular views.

**C. Past Harassment Need Not Be Proved to Establish a Freedom of Association Claim**

The Fifth Circuit has emphasized that individuals with freedom of anonymous association claims need not prove past harassment to succeed on their claim. In *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), the ordinance at issue was declared unconstitutional even though it did not deter speech and association so much by the exposure of individuals' beliefs to public observation, as by the *threat* of exposure to public opprobrium and recrimination. *Id.* at 402. "The public opprobrium, reprisals, and threats of reprisals that attend the airing of one's affiliation with an unpopular cause . . . are substantial disincentives to engaging in such affiliations." *Id.* at 399. Disclosure in that case, as in this one, occurred only *after* members of the organization differentiated themselves as supporters of particular conduct.

The Eleventh Circuit summarily disposed of the particularized objection issue without analysis, accepting the Florida Bar's absurd argument that registering dissent does not reveal one's position. *Gibson*, 906 F.2d at 632. This Court specifically held otherwise in *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 n.42 (1977). In *Abood* this Court stated that a dissenter must not be required to make particularized objections because this "would confront an individual . . . with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure." *Abood*, 431 U.S. at 241. In *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990), the First Circuit relied on *Abood* to hold that the "primary feature of a constitutional system is that dissenters be able to trigger refunds by means of general objections so that they need not make public their views on specific issues." *Id.* at 635. *See also Galda v. Bloustein*, 686 F.2d 159, 169 (3d Cir. 1982) (refund mechanism held unconstitutional because in the absence of a compelling state interest, "a fee used to finance political activity cannot be exacted—even temporarily—from those unwilling to pay").

## II

### PARTICULARIZED OBJECTIONS VIOLATE THE RIGHT OF ANONYMOUS ASSOCIATION

Anonymity is essential to uninhibited political activity in a democratic society. Confidentiality prevents the fear of reprisal that threatens to suppress the vigorous interchange of ideas at the core of the First Amendment's

guarantee of free speech and association. American society is based on special indulgence to nurture the free expression of minority views. Because mere identification with certain disfavored ideologies can result in harassment which may silence those voices, the Constitution protects private support of political associations. *Federal Election Commission v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 417 (2d Cir. 1982).

The power of a government to repress dissent is substantial and can be exercised in myriad subtle ways. Anonymity is an essential element of freedom of association and the ability to express dissent effectively. As a result, removing the cloak of anonymity from those who object to the political and ideological stands taken by the Florida Bar threatens important First Amendment values. Such forced disclosure could likely lead to repercussions which consequently instill in the Bar members the fear of becoming linked with the unpopular or the unorthodox, and of suffering socially or economically because of that linkage.

This Court in *Hudson* described one remedial means to protect objectors' constitutional rights. The *Hudson* procedures are to be construed as the *minimum* requirements. *Hudson*, 475 U.S. 292 at 310. Through *Hudson* and *Keller*, unions and integrated bars were encouraged to experiment with procedures to achieve the least infringement on objectors' constitutional rights while still allowing the organization access to funds to which it is entitled. New procedures have been implemented by organizations all over the country since the *Hudson* decision, and met in the courts with varying success. The procedure at issue does not meet the policy goals set

forth in *Hudson* and *Keller*. *Hudson*, 475 U.S. at 302 n.9, 305-06; *Keller*, 110 L. Ed. 2d at 11.

The procedural deficiencies here are such that objectors to the Florida Bar's political and ideological expenditures cannot protect their First Amendment rights. The Bar does not permit advance reduction of dues, does not provide precollection notice of the amount of nonchargeable dues, and requires issue-by-issue objections over the course of the year. The Florida Bar's procedure is not only cumbersome, but designed to discourage all but the most zealous objector.

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## CONCLUSION

By choosing to enact procedures that require particularized objections and do not provide for advance notice or reduction, the Florida Bar ignored the First Amendment's protection of privacy of beliefs. The Eleventh Circuit erroneously upheld the procedures as constitutional, in contravention of express rulings to the contrary by this Court. The Eleventh Circuit decision should be reversed.

DATED: April, 1991.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

ROBERT E. GIBSON,

v.

*Petitioner,*

THE FLORIDA BAR, *et al.*,

*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

**BRIEF FOR NATIONAL EDUCATION ASSOCIATION,  
CALIFORNIA TEACHERS ASSOCIATION AND  
SAN BERNARDINO TEACHERS ASSOCIATION  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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**BRIEF FOR NATIONAL EDUCATION ASSOCIATION,  
CALIFORNIA TEACHERS ASSOCIATION AND  
SAN BERNARDINO TEACHERS ASSOCIATION  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

This brief *amici curiae* is submitted by the National Education Association (NEA), the California Teachers Association (CTA) and the San Bernardino Teachers Association (SBTA), with the written consent of the parties, as provided in the Rules of this Court.

### INTEREST OF AMICI CURIAE

NEA is a nationwide labor organization with a current membership of more than two million persons, the vast majority of whom are employed by public school districts, colleges and universities. NEA operates through a network of state and local affiliates. CTA is NEA's state

affiliate in California, and SBTA is NEA's local affiliate in the San Bernardino, California School District.

Many of NEA's local affiliates, including SBTA, are recognized as exclusive bargaining representatives, and are parties to collective bargaining agreements that contain agency fee provisions that are subject to the procedural requirements set forth in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). In *Grunwald v. San Bernardino City Unified School District*, 917 F.2d 1223 (9th Cir. 1990), *petition for rehearing and suggestion for rehearing en banc pending*, a panel of the Ninth Circuit held, over Judge Kozinski's strong dissent, that SBTA's agency fee collection procedure—a procedure used by many other NEA affiliates as well—does not satisfy *Hudson* in two respects.

First, the *Grunwald* court held that nonmembers who object to paying the full agency fee are entitled to an "advance reduction" of the fee, even where the entire amount paid by an objecting nonmember is immediately upon collection placed in an interest-bearing escrow account until the portion of the fee that represents activities that cannot constitutionally be charged to objectors has been determined. 917 F.2d at 1227-28 (majority opinion); *see also id.* at 1230-31 (Kozinski, J., dissenting).

Second, the *Grunwald* court held that it is unconstitutional for agency fee deduction to begin before notice of the right to object to the amount of the fee has been sent to nonmembers, even where the entire amount paid by all agency fee payers is placed in escrow in the meantime. *Id.* at 1228 (majority opinion); *see also id.* at 1231 (Kozinski, J., dissenting).

The present case involves issues of "advance reduction" and "pre-collection notice" that are akin to the issues presented in *Grunwald*, although here the issues involve the collection of state bar dues rather than union agency

fees.<sup>1</sup> Petitioner cites and relies upon *Grunwald* in support of his position on both of these issues. *See* Brief for Petitioner ("Pet. Br.") at 13-14 (advance reduction); *id.* at 21 (pre-collection notice).

Because of the similarity of the issues involved, the Ninth Circuit has issued an order deferring consideration of the Petition for Rehearing and Suggestion for Rehearing En Banc that has been filed by SBTA in *Grunwald*, pending this Court's decision in this case. The Ninth Circuit has stated that "[t]he decision of the Supreme Court in *Gibson* will affect our consideration of the Petition . . . ." *Grunwald v. San Bernardino City Unified School District*, Nos. 88-6617, 88-6619 (9th Cir., March 29, 1991).

Accordingly, this Court's decision on the issues of advance reduction and pre-collection notice that are presented in the instant case will have a direct impact on the ultimate disposition of *Grunwald*, and on the agency fee collection procedures used by many other NEA affiliates. This brief is addressed to those two issues.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court held that to "protect[ ] the basic distinction between activities which all bargaining unit employees may be required to subsidize and those for which objecting nonmembers cannot constitutionally be charged, certain "[p]rocedural safeguards are necessary." *Id.* at 302. The Court stated that in fashioning such procedural safeguards, "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.*

<sup>1</sup> In addition, there are certain important differences between the procedure used by the Florida Bar to collect dues and the procedure used by SBTA to collect agency fees. *See infra* at 16-17.



The Court in *Hudson* clearly did not intend to require procedures that would prove unduly burdensome. See *Keller v. State Bar*, 110 S.Ct. 2228, 2237 (1990) (emphasizing that unions can “operate[] successfully within the parameters of [the required] procedures”) (quoting *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 767 P.2d 1020, 1046 (1989) (Kaufman, J., concurring and dissenting)). Nonetheless, in a series of post-*Hudson* cases, agency fee payers have attempted, sometimes successfully, to saddle unions with judicially imposed procedural requirements that are *not* necessary for “preventing compulsory subsidization of ideological activity,” *Hudson*, 475 U.S. at 302, and that plainly “restrict[] the Union’s ability to require every employee to contribute to the cost of collective-bargaining activities,” *id.* See, e.g., *Gilpin v. AFSCME*, 875 F.2d 1310, 1313 (7th Cir.) (Posner, J.) (“the plaintiffs and the National Right to Work Foundation [we]re merely trying to hamstring the union” by their demands in an agency fee case), *cert. denied*, 110 S.Ct. 278 (1989); *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1232 (9th Cir. 1991) (Kozinski, J., dissenting), (plaintiffs were “using [agency fee] litigation to pursue . . . political objectives by making life difficult for the union”), *petition for rehearing and suggestion for rehearing en banc pending*.

In this case, which arises in the context of compulsory bar dues,<sup>2</sup> petitioner seeks to compel the adoption of procedures which, in large part, would “hamstring the [Bar],” *Gilpin*, 875 F.2d at 1313, without providing significant additional protection to any cognizable constitutional interests. This is particularly true of petitioner’s demands (1) that there be an “advance reduction” of

<sup>2</sup> This Court has held that the principles expressed in *Hudson* are relevant in determining the procedural protections required in the collection of bar dues. See *Keller*, 110 S.Ct. at 2237-38. The Court has not held, however, and nothing in this brief should be understood to suggest, that the requirements in the two contexts must be identical.

dues, rather than simply an escrow of disputed funds pending the resolution of any objections, Pet. Br. at 10-15, and (2) that notice of the Bar’s expenditures and of the right to object thereto must be provided before any dues are collected, *id.* at 21-22.

We show in Part I that petitioner’s demand for an “advance reduction” system should be rejected. Either an advance reduction *or* an interest-bearing escrow account fully protects the constitutional rights at stake, and there is no basis for petitioner’s contention that *both* procedures must be provided.

In Part II we show that, at least where the fees collected from potential objectors are placed in escrow pending the submission and resolution of objections, the Constitution is not violated where notice of the right to object is sent after the collection process has begun.

Finally, we show in Part III that petitioner’s appeal to the concept of “narrow tailoring” does not provide a justification for “advance reduction,” “pre-collection notice” or other procedures that do not provide any significantly increased protection of constitutional rights but simply hamper the ability of a union or a state bar to collect funds to which the organization is lawfully entitled.

## ARGUMENT

### I. WHERE AN OBJECTOR'S FEES ARE PLACED IN ESCROW PENDING DETERMINATION OF THE ULTIMATE AMOUNT TO BE CHARGED, NO "ADVANCE REDUCTION" IS CONSTITUTIONALLY REQUIRED

A. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Court held that a public sector union may constitutionally charge all bargaining unit employees for certain activities, but that there are certain other activities which objecting nonmembers may not constitutionally be required to subsidize.<sup>3</sup>

Subsequently, in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court held that to "protect[] the basic distinction drawn in *Abood*" between activities for which objectors' compelled fees may be spent and activities for which such fees may *not* be spent, certain "[p]rocedural safeguards are necessary." *Id.* at 302. Specifically, the Court held that three procedural requirements are applicable to the collection of agency fees:

We hold today that the constitutional requirements for the Union's collection of agency fees include [1] an adequate explanation of the basis for the fee, [2] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and [3] an escrow for the amounts reasonably in dispute while such challenges are pending. [*Id.* at 310.]

Petitioner seeks to read a *fourth* requirement into *Hudson*: namely, that a union collecting agency fees, or a bar association collecting dues, must "provide an objector an advance reduction for the proportion of dues that it expects to use for political activity." Pet. Br. at 10. Al-

<sup>3</sup> This case does not present any issue as to how the line between chargeable and nonchargeable activities should be drawn in either the union or bar context. See generally *Lehnert v. Ferris Faculty Assn.*, No. 89-1217 (May 30, 1991).

though an "advance reduction" requirement might appear at first blush to be innocuous, there are in many instances compelling reasons why such a requirement would prevent a union or a state bar from collecting funds to which it is lawfully entitled. See *Grunwald*, 917 F.2d at 1232 & n.4 (Kozinski, J., dissenting). And, in all events, nothing in *Hudson* or in the applicable constitutional principles requires that there be an advance reduction.

B. In *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), the Court explained why, under the Railway Labor Act, a union is not permitted to use a pure rebate system, under which the union "exact[s] and us[es] full dues, then refund[s] months later the portion that it was not allowed to exact in the first place." *Id.* at 444. The Court stated that under such a system, "the union effectively charges the employees for activities that are outside the scope of the statutory authorization," and thus "obtains an involuntary loan for purposes to which the employee objects." *Id.* Having defined the respect in which a pure rebate system is deficient, the Court went on to identify two "acceptable alternatives," *id.*, "advance reduction of dues and/or interest-bearing escrow accounts," *id.* (emphasis added), either of which eliminates any danger of "an involuntary loan for purposes to which the employee objects."

There is nothing in the language or reasoning of *Hudson* to signal any departure from *Ellis*. Indeed, this aspect of *Ellis* is quoted with approval in *Hudson*. See 475 U.S. at 303-04. To be sure, the union in *Hudson* had an advance reduction system, see 475 U.S. at 295,<sup>4</sup> but

<sup>4</sup> The union in *Hudson* reduced the fee for all nonmembers to 95% of union dues, *id.*, apparently because the collective bargaining agreement and the state statute were thought to require such a reduction. We note that even if petitioner's argument here were accepted, an advance reduction would be *constitutionally* required only for "objector[s]," see Pet. Br. at 10, 12, 15; and a *nonmember* does not become an *objector* until he "make[s] his objection known." *Hudson*, 475 U.S. at 306 n.16.



that feature of the union's procedure was mentioned in this Court's decision simply because it was in connection with making the advance reduction that the union informed feepayers of the proportion of expenditures that it had determined to be chargeable. *Id.* The Court concluded that the explanation provided by the union was inadequate, because it did not provide information sufficient to enable a nonmember to make an informed decision whether to object to the union's determination. *Id.* at 306-07. The Court's statement that "the 'advance reduction of dues' was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share," *id.* at 306, simply reflected this conclusion. The same is true of the other references to an advance reduction in *Hudson*, see *id.* at 309, notwithstanding petitioner's effort to wrench those references from their context, see Pet. Br. at 11. In each of those statements the Court was speaking to the requirement of adequate notice, not to any requirement of an advance reduction as such.

The fact that the opinion in *Hudson* contains an extended discussion of why an adequate notice is constitutionally required, *id.* at 306-07, but contains nary a word to suggest why an advance reduction would be required, strongly indicates that the Court was requiring only the former, not the latter.

C. The requirement of an advance reduction is, moreover, at odds with the principle on which *Hudson* is based—namely, that it is the spending of objectors' funds, and not their mere collection, that gives rise to constitutional concerns.

As the Court put it in *Hudson*, "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302 (emphasis added), quoting *Abood*, 431 U.S. at 237. See also *Hudson*, 475 U.S. at

301-02 (the right to be protected is the nonmembers' "constitutional right to 'prevent the Union spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative'" (emphasis added), quoting *Abood*, 431 U.S. at 234; *Hudson*, 475 U.S. at 305 ("the quality of [nonmembers'] interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear") (emphasis added); *Machinists v. Street*, 367 U.S. 740, 771 (1961) (feepayer has no claim "from the enforcement of the union-shop agreement by the mere collection of funds" (emphasis added))).

The Third Circuit recognized this critical distinction in *Hohe v. Casey*, 868 F.2d 67, 72 (3d Cir.), cert. denied, 110 S. Ct. 144 (1989), when it stated:

The First Amendment interest protected by *Hudson's* requirements is the nonmembers' "interest in not being compelled to subsidize the propagation of political or ideological views that they oppose." . . . Since the Union has escrowed the entire amount of all fair share fees deducted . . ., this interest is protected.

And, Judge Kozinski also saw the matter clearly in his *Grunwald* dissent, 917 F.2d at 1231:

[T]he [*Hudson*] Court decried the "tyrannical character of forcing an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" 475 U.S. at 305, 106 S.Ct. at 1075. Here, the union uses not a penny for nonrepresentational activities, as 100% of the agency fee is safely tucked away in escrow. Thus, objecting employees do not suffer the injustice of having their money used to advance causes they abhor.<sup>5</sup>

<sup>5</sup> Judge Kozinski added:

In fact, the union goes well beyond what the Supreme Court requires; under *Hudson*, the union need not give up control over the entire agency fee, only the portion that might rea-



D. Petitioner nevertheless maintains that preventing subsidization of ideological activity “was not the sole ‘objective’ of the procedures” that *Hudson* mandated. Pet. Br. at 11 (emphasis by petitioner).<sup>6</sup> But petitioner does not identify any other “objective” underlying the *Hudson* procedures that could justify the imposition of an advance reduction requirement.

1. Petitioner begins with the premise that “the agency shop *itself* impinges on the nonunion employees’ First Amendment interests.” Pet. Br. at 12 (emphasis by petitioner), quoting *Hudson*, 475 U.S. at 309. Petitioner states that this is true of “the collection of compulsory union fees even for constitutionally permissible purposes.” Pet. Br. at 12. However that may be, the relevant question is whether any First Amendment impingement arising from “the agency shop *itself*” is increased if the amount of the agency fee payment is, say \$40 per month rather than \$32 per month, when all funds are placed in an interest-bearing escrow account and none is used for matters as to which an objector cannot lawfully be charged.<sup>7</sup>

sonably be questioned by an objecting employee, 475 U.S. at 310, 106 S. Ct. at 1077. By putting the entire agency fee into escrow, the union eliminates any quibble about what amount might be deemed reasonably subject to question. [*Id.* at 1231 n.2.]

<sup>6</sup> Petitioner asserts that “[w]ere that true, *Hudson* . . . need not have announced ‘constitutional requirements for the Union’s collection of agency fees,’ and would have prescribed only *post*-collection protections.” *Id.* at 11-12, quoting 475 U.S. at 310 (emphasis by petitioner). That argument is without force. The additional protection required by *Hudson* to which petitioner is referring—“an adequate explanation of the basis for the fee,” 475 U.S. at 310—is intended to enable individuals to file an informed objection, *see id.* at 306, which, like the other *Hudson* requirements, will enable objectors to prevent the expenditure of their funds on nonchargeable activities.

<sup>7</sup> The figures used in this example are from *Grunwald*—with the caveat that the \$8 monthly “overcharge” is assessed for only a few months at the outset of the school year, and is then *more than offset* by an up-front adjustment for the entire year. *Grunwald*, 917

Petitioner’s answer to that question—that whenever the government collects money from an individual “the individual’s ability to act according to his beliefs and to associate with others of his political persuasion is constrained,” Pet. Br. at 12, quoting *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion)—is patently wrong. Judge Kozinski disposed of that contention as follows in *Grunwald*:

The . . . first amendment harm plaintiffs suggest is that the \$8 a month is not available to *them* for three (or seven) months, so they are unable to use the money to exercise *their* first amendment rights . . . . If this argument were accepted, every suit for money against a party acting under color of government authority would automatically become a first amendment case. In any event, it is a type of harm that the Court in *Hudson* did not recognize. [917 F.2d at 1231 (dissenting opinion) (emphasis in original).]

Petitioner’s argument that any excessive collection of money by the government gives rise to a First Amendment claim therefore “proves too much.” *Arcara v. Cloud Books, Inc.* 478 U.S. 697, 705-06 (1986).<sup>8</sup> If the mere deprivation of money, as distinguished from the use of the money to subsidize views to which an individual

F.2d at 1225 (majority opinion); *id.* at 1230 and n.1 (Kozinski, J., dissenting). *See infra* n.11.

<sup>8</sup> *Arcara* involved a First Amendment challenge to a statute requiring closure of any premises being used as a site for solicitation of prostitution. The challenge was based on the fact that the building involved in the case was a bookstore. To the argument that “the effect of the statutory closure remedy impermissibly burdens [the respondent’s] bookselling activities,” *id.* at 705, the Court stated:

[T]his argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suspect that such liability gives rise to a valid First Amendment claim. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976).

objects, could ever rise to the level of a First Amendment claim, this could only be where the loss of the money results in "substantial rather than merely theoretical restraints on the quality and diversity of political speech," *Buckley v. Valeo*, 424 U.S. 1, 19 (1976), i.e., where the challenged governmental action has a "substantial deleterious effect" on the individual's ability to speak. *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989). As the figures here and in *Grunwald* make clear, no such case is presented by the lack of an advance reduction of a portion of bar dues or agency fees.<sup>9</sup>

2. Petitioner also suggests that an advance reduction is necessary to prevent an improper deprivation of *property*. Pet. Br. at 12. Judge Kozinski succinctly disposed of that contention in *Grunwald*:

Any due process concern is satisfied by the fact that there is an accounting, the opportunity to have the matter resolved by an impartial arbitrator, and the payment of interest (or its equivalent . . . ) to make up for any lost use of the funds. [917 F.2d at 1231 (dissenting opinion)].<sup>10</sup>

<sup>9</sup> In referring to the impingement that arises from "the agency shop itself," petitioner may be suggesting that the mere act of sending money to an escrow account for possible eventual payment to a union (or, here, a state bar) constitutes a form of association with the union or state bar even if the money is never actually paid over to the organization for its use. Even if that dubious proposition were accepted, the fact remains that any element of association that may be inherent in the act of sending a payment to an escrow account remains the same whether the amount of the payment is \$32 or \$40. As in *Ellis*, where "[t]he [plaintiff's] objection [to contributing to the cost of social activities was] that these are union social hours," 466 U.S. at 456 (emphasis by the Court), setting the monthly amount of an agency fee payment at \$40 a month rather than \$32 a month "does not increase the infringement of . . . First Amendment rights already resulting from the compelled contribution . . .," *id.* (emphasis added), unless the additional amount is *spent* on nonchargeable matters.

<sup>10</sup> Even assuming that a substantive due process issue might arise if a defendant had no rational basis for refusing to adopt an

E. In sum, there is no constitutional basis for petitioner's demand for an advance reduction where an objector's fees are placed in escrow. As the Court recognized in *Ellis*, either system protects the constitutional right at stake here by ensuring that none of an objector's money is used, even temporarily, for activities he or she cannot constitutionally be required to support. "[T]he mere collection of funds," without any impermissible expenditure, gives petitioner no claim. *Machinists v. Street*, 367 U.S. at 771.<sup>11</sup>

advance reduction system, that is not the situation here, *see* 906 F.2d at 631, nor is it the case in *Grunwald*. *See* 917 F.2d at 1232 and n.4 (Kozinski, J., dissenting). And, if petitioner is suggesting that an advance reduction is required as a matter of *procedural* due process, that suggestion is equally unavailing. The "private interest . . . affected," *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), by placing a few additional dollars into escrow instead of leaving it in the plaintiff's pocket while objections are resolved is minimal. On the other hand, "the fiscal and administrative burdens," *id.*, that an advance reduction system would entail would be considerable. *See Grunwald*, 917 F.2d at 1323 and n.4 (Kozinski, J., dissenting).

<sup>11</sup> *Grunwald* illustrates just how devoid of logic or constitutional principle the "advance reduction" concept can become. In that case the union's procedure requires a nonmember employee to pay into escrow for a few months at the outset of the school year an amount equal to monthly union dues; but then, after the process of notice and objection has been completed but before the school year has ended, objectors receive from the escrow account a "rebate" check in the amount of the "nonchargeable" portion of the *entire year's* dues. Under this system, not only does the 100% escrow ensure that none of an objector's money is ever *used* for nonchargeable activities, but, because the chargeable portion invariably exceeds the total amount collected prior to the rebate, the timing of the annual "rebate" is such that an objector does not pay *even into escrow* more than the chargeable portion of the year's fee. (Indeed, under SBTA's system "the objector makes a small profit" over what would be the case if a month-by-month advance reduction system were used. 917 F.2d at 1230 (Kozinski, J., dissenting).) Despite these undisputed facts, and despite the fact that *Hudson* clearly contemplates setting an agency fee on an annual basis, *see* 475 U.S. at 307 and n.18, the *Grunwald* majority held that *Hudson* requires



**II. AT LEAST WHERE THE FEES OF ALL POTENTIAL OBJECTORS ARE PLACED INTO ESCROW UNTIL OBJECTIONS HAVE BEEN RECEIVED AND RESOLVED, THE NOTICE ADVISING INDIVIDUALS OF THEIR RIGHT TO OBJECT NEED NOT PRECEDE THE FIRST DEDUCTION OF FEES**

Members of the Florida Bar are required to pay their full annual dues on or before July 1 of each year, the beginning of the Bar's fiscal year. Whenever the Bar takes a position on a legislative issue during the ensuing fiscal year, members are given the opportunity to file an objection to the expenditure of their dues for that purpose. Once such an objection is filed, a portion of the objector's dues is placed in escrow pending resolution of the objection.

In *Grunwald* a somewhat different procedure is involved, reflecting the nature of academic employment. Each school year, agency fees are collected via monthly payroll deductions from September 30 to June 30, with each of the ten deductions amounting to one-tenth of the annual dues paid by SBTA members. Feepayers (*i.e.*, teachers who have not become members of SBTA) receive a notice no later than October 15 advising them of their right to receive a "rebate" of the portion of the fee that is attributable to matters for which objecting feepayers may not be charged. Feepayers have until November 15 to submit an objection to paying the full fee (*i.e.*, to demand a "rebate"). Prior to that date, *all* fees are placed in escrow immediately upon receipt, and are kept in escrow until the end of the period for filing objections. The full amount of the fees paid by those feepayers who file an objection is retained in escrow until the objection is resolved, and at that point an up-front "rebate" of the nonchargeable portion of the *entire year's* fee is paid

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a union to apply an advance reduction to each *monthly installment* of the agency fee.

to each objector. As discussed, this "rebate" is received by the objector before he or she has paid, even into escrow, the full chargeable amount for the year. See *supra* n. 11.

Petitioner advances three attacks on the notice procedures of the Florida Bar. First, petitioner challenges the sufficiency of the information provided in the Bar's notices. Pet. Br. at 16-18. No challenge to the sufficiency of SBTA's notice was asserted in *Grunwald*, and we therefore do not address this aspect of the present case, except to note in the margin that petitioner has misstated the teaching of *Hudson* on this subject.<sup>12</sup>

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<sup>12</sup> Petitioner erroneously describes the notice requirements set forth in *Hudson* in at least two regards. First, petitioner asserts that "[t]o satisfy *Hudson*, the notice must explain which expenditures the organization demanding the fee considers chargeable and why." Pet. Br. at 18. If by this assertion petitioner is suggesting that a union (or in this case, the Florida Bar) must explain in its notice the reasoning that was used in determining why a particular expenditure is considered to be chargeable, petitioner significantly misreads *Hudson*. The only "explanation" required by *Hudson* is an "identif[ication]" of the major categories of expenditures that the union views as chargeable or nonchargeable. 475 U.S. at 306-07.

Second, by stringing together quotations from separate parts of the *Hudson* opinion, petitioner suggests that an organization's identification of chargeable and nonchargeable expenditures must be "verified by an independent autor." Pet. Br. at 16-17. As the Courts of Appeals unanimously have concluded, however, the role of the independent auditor under *Hudson* is *not* to make the legal determination of whether particular expenditures are or are not legally chargeable, but rather to determine whether the expenditures were in fact made as reported by the union or the state bar. See, *e.g.*, *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987); *Dashiell v. Montgomery County*, 925 F.2d 750, 755-56 (4th Cir. 1991); *Lehnert v. Ferris Faculty Ass'n*, 893 F.2d 111, 112 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 2586 (1990); *Gwirtz v. Ohio Education Ass'n*, 887 F.2d 673, 680 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1810 (1990); *Ping v. National Education Association*, 870 F.2d 1369, 1374 (7th Cir. 1989). In short, this Court should not allow petitioner's arguments with respect to notice to impose unworkably burdensome requirements on



Second, petitioner challenges the Florida Bar's procedure of requiring a separate objection each time the Bar takes a legislative position to which a member objects. This, petitioner asserts, requires an objector to "disclose[], by negative implication, those causes [he] does support," Pet. Br. at 19, and places on the objector "the considerable burden of monitoring" the Bar's publication twice a month, *id.* at 20. The procedure in *Grunwald* does not require multiple, item-by-item objections; under that procedure, a nonmember need only file a single objection each membership year, and need only state in the most general terms that he or she objects to his or her money being used for any nonchargeable activities.<sup>13</sup>

unions or state bars, whether they be in the form of unrealistic accounting requirements or notices that look more like legal briefs.

<sup>13</sup> The annual notice that is sent by SBTA, and by *amici* and their other affiliates, indicates the percentage of the agency fee that is chargeable to objecting feepayers based, as *Hudson* expressly permits, on expenditures actually made by the union during its preceding fiscal year. Unlike the case with the Florida Bar, the spending patterns of *amici* and their affiliates remain fairly constant from year to year, so that the percentage of the budget that was expended for chargeable activities during any one year is likely to reflect fairly closely the percentage expended for such activities during the following year. Moreover, given the wide range of nonchargeable activities typically engaged in by unions, and the frequency with which unions engage in such activities (*see, e.g., Lehnert v. Ferris Faculty Association, et al.*, No. 89-1217 (May 30, 1991)), the alternatives of monitoring and categorizing individual union expenditures on an ongoing basis as these expenditures are made would be at worst unworkable and at best unduly burdensome, both for the union and the objecting feepayers. Accordingly, "the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." *Hudson*, 475 U.S. at 307, n.18.

In order to assure that the agency fee is as current as is reasonably possible, *amici* and their affiliates recalculate the chargeable portion of the fee each year, and, in turn, require that objections be filed annually when feepayers are informed of the new fee and are provided with the information necessary under *Hudson* to assess the propriety of that fee. Turnover in the workforce, recordkeeping limitations and other practical considerations counsel against

We therefore do not address the issue whether the Florida Bar may constitutionally require item-by-item objections.

Finally, petitioner complains that the Florida Bar does not provide notice of its expenditures or of the right to object until dues have already been collected and partially spent. Pet. Br. at 21. Because *Grunwald* involved a somewhat similar issue, with the Ninth Circuit holding, over Judge Kozinski's dissent, that "notice of . . . the agency fee must be given to all nonmembers before any fees may be collected from them." 917 F.2d at 1228 (emphasis by the court), *see id.* at 1231 (Kozinski, J., dissenting), we now address this issue.

It is important at the outset to note a basic difference between the procedure at issue in *Grunwald* and the procedure at issue here. Under the procedure in *Grunwald*, during the short period between the commencement of monthly fee deductions and the sending of the notice, all fees collected from all nonmembers—that is to say, from all "potential objectors," *see Hudson*, 475 U.S. at 306—are placed into an interest-bearing escrow account. As a result, no money collected from any potential objector is spent by the union before the individual has been given notice and an opportunity to object, and if he or she does object, until that objection has been resolved.

Accordingly, petitioner's criticism of the timing of the Florida Bar's notice does not apply to the SBTA procedure that is at issue in *Grunwald*. Petitioner's argument that in this case notice must "precede the collection of any compulsory fees" hinges on the fact that under the Bar's procedure, it is the notice and subsequent objection "which triggers escrow." Pet. Br. at 21 (emphasis added). Petitioner's complaint is that because of the tim-

the carryover of objector status from year to year. And, experience teaches that it is not at all uncommon for an individual to object in some years but not in others, depending on his or her view of the union's activities at the time.

ing of the notice, the Bar's procedure does not provide for an escrow until dues have been *partially spent*:

Under the Bar's procedure, notice, opportunity to object, and subsequent escrow do not occur until after the member's dues have been collected, and the Bar has been able to spend them. Thus, there is both a certainty that some portion of the dues will be spent on the process of adopting legislative positions, because notice is not even given until after that has occurred, and a risk that still more will be spent on the advocacy of those positions during the time that it takes for notice to be given in the Bar's publication and objection made by the individual attorney. [Pet. Br. at 22 (emphasis deleted).] <sup>14</sup>

Because the procedure at issue in *Grunwald* does not allow any potential objector's money to be spent until objections have been filed and resolved, the timing of the notice in *Grunwald* would not raise any constitutional issue even if the timing of the notice in this case were found to be constitutionally unacceptable.<sup>15</sup>

Yet the Ninth Circuit held in *Grunwald* that it is unconstitutional for SBTA to send its notice after the first monthly payroll deduction has been made, even though

<sup>14</sup> The heading of this portion of petitioner's argument likewise reflects that petitioner's objection to the timing of notice under Florida Bar's procedure is based entirely on the contention that "The Bar's Scheme Permits It to Spend Objectors' Dues for Constitutionally Impermissible Purposes." Pet. Br. at 21 (emphasis added).

<sup>15</sup> This is not to suggest that the Bar's procedure *should* be viewed as unacceptable. The Bar has explained why it would be impracticable for the Bar to give pre-collection notice. And, the Court of Appeals has addressed petitioner's concerns by requiring that the Bar, in making any necessary rebate to an objector, must pay interest calculated as of the date that payment of the objector's dues was *received*. See 906 F.2d at 632. As the Court of Appeals held, the payment of such interest is adequate "to protect against the danger that the objecting members' funds will be used . . . to finance the Bar's political activity. . . ." *Id.* To require more than this would be unjustified given the Bar's explanation as to why pre-collection notice is unworkable.

the parties stipulated that there are legitimate logistical reasons why SBTA does not send its notice before that point. See 917 F.2d at 1232 and n.4 (Kozinsky, J., dissenting) (quoting stipulation). The court's only explanation for that ruling was its pronouncement that "[a]dvance notice must be given to protect the nonmember's first amendment interest—a fair opportunity to identify the impact of the government action on his interests and assert a meritorious first amendment claim." *Id.* at 1228 (majority opinion). But the *Grunwald* majority could not point to any way in which the timing of SBTA's notice fails to provide the requisite protection, and in reality, such protection is provided.

The purpose of the *Hudson* notice is to enable individuals to file objections which will entitle them to prevent the spending of their money on nonchargeable activities and, if they wish, to challenge the amount of the fee before an impartial decisionmaker. See 475 U.S. at 306-07. In *Grunwald*, the deadline for filing objections was November 15, and the arbitration to determine the chargeable amount was conducted in January. A notice sent by mid-October thus provided ample time for potential objectors to protect their rights.

The *Grunwald* majority did not explain why this is not so, and we submit that Judge Kozinski's dissent on this point is unanswerable:

Nothing would be gained by giving nonmembers the information before any deductions are made. The relevant event is not the commencement of the deductions but the deadline for requesting a refund or review by an impartial arbitrator. Notice, after all, must have a purpose. The purpose here is to allow nonmembers to make a meaningful decision in exercising their right to object. So long as the union provides adequate information well in advance of the time when nonmembers must raise their objections, the purpose of notice is amply served. *Id.* at 1231 (dissenting opinion).



As Judge Kozinski's analysis reflects, and as this Court has observed, "[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 17-19 (1978). See also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985) (requiring notice prior to deprivation where a *hearing* is required prior to deprivation). In the contexts of agency fees and bar dues, it is clear that no hearing need be conducted before funds are collected. See *Hudson*, 475 U.S. at 310 (hearing must be held "reasonably prompt[ly]" after fees are collected, and a portion of the fees collected must be placed in escrow pending the hearing). Indeed, petitioner does not argue otherwise. This disposes of any argument that pre-collection notice is required by *procedural due process*; for, if no *hearing* of any kind must be held before collection of dues or fees begins, there is no reason why *notice* must be sent before collection begins. And, any claim that pre-collection notice is required by the *First Amendment* is untenable where, as in *Grunwald*, none of an objector's money is spent until objections have been received and resolved. See *supra* at 8-12.

Accordingly, however the Court may resolve the question of pre-collection notice in this case, see *supra* n.15, the Court should make it clear, contrary to the holding of the Ninth Circuit in *Grunwald*, that pre-collection notice is not essential where a pre-collection *escrow* is provided to potential objectors.

### III. THE PRINCIPLE THAT PROCEDURES FOR COLLECTION OF BAR DUES OR AGENCY FEES SHOULD BE "CAREFULLY TAILORED" DOES NOT JUSTIFY STRIKING DOWN PROCEDURES THAT DO NOT RESULT IN AN OBJECTOR'S MONEY BEING SPENT ON NONCHARGEABLE ACTIVITIES, NOR DOES IT JUSTIFY SUBJECTING UNIONS OR STATE BARS TO UNNECESSARILY BURDENSOME REQUIREMENTS SUCH AS PETITIONER PROPOSES

As a prelude to his arguments with respect to advance reduction, pre-collection notice, and the other procedures petitioner would have the Court mandate, petitioner asserts that "the rule of first-amendment strict scrutiny" should dictate the procedures for collecting bar dues or agency fees. Pet. Br. at 10.

Petitioner's reference to "strict scrutiny" is misleading. *Hudson* did not apply "strict scrutiny" as such; rather, the Court stated that agency fee collection procedures must be "carefully tailored to minimize the infringement." 475 U.S. at 303.<sup>16</sup> And, this Court's prior decisions make plain that such a requirement of "careful tailoring" does not "require elimination of all less restrictive alternatives." *Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 478 (1989); *Ward v. Rock Against Racism*, 491 U.S. at 796-800.

Furthermore, the "tailoring" requirement means simply that the government may not "*burden substantially more speech* than is necessary to further the government's legitimate interest." *Fox*, 492 U.S. at 478 (emphasis added), quoting *Ward*, 491 U.S. at 799. That is to say, collec-

<sup>16</sup> See also *Abood*, 431 U.S. at 222. Indeed, in his separate opinion in *Abood* Justice Powell objected to the fact that the Court did not adopt a requirement of proof "that any [exact] union dues or fees . . . are needed to serve paramount government interests." *Id.* at 255 (Powell, J., concurring in the judgment) (emphasis added). As Justice Powell saw it, the opinion for the Court in *Abood* required only that the collection of fees be "'relevant or appropriate' to asserted governmental interests." *Id.* at 254.



tion procedures for bar dues or agency fees must be "carefully tailored" to "minimize the infringement" on *First Amendment rights*, not, as petitioner seems to believe, to minimize the amount of money an individual must pay into escrow pending resolution of an objection.

As we have shown, the First Amendment right at stake in this context is a right not to have one's money spent on ideological activities to which one is opposed. *See supra* at 8-12. The requirement of "careful tailoring" cannot justify tinkering with union or bar association procedures that do not allow such impermissible spending. Where, as in *Grunwald*, an escrow system prevents any impermissible spending of an objector's money, advance reduction or pre-collection notice serve no constitutional purpose.

Indeed, even where there is a possibility that some part of an individual's compelled dues or fees *might* be spent on nonchargeable matters, the Court took pains in *Hudson* to make clear that "[a]bsolute precision" is not required in this regard. 475 U.S. at 307 n.18. Thus, the Court required only an "adequate," not an exhaustive, "explanation of the basis for the fee," *id.* at 306, 310; allowed the collection of fees without a pre-deprivation hearing, *see supra* at 20; allowed for the resolution of objections through an arbitration process that does not utilize full evidentiary safeguards, *id.* at 308 n.21; and allowed an escrow of less than 100% of the fee paid by an objector while challenges to the fee are pending, *id.* at 310. *See supra* n.5. In these and other respects, the Court refused to impose requirements which, while they might provide some additional protection of First Amendment interests, would unduly burden a union's effort to collect agency fees. The Court thus heeded its own admonition that "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" *Id.* at 302, quoting *Abood*, 431 U.S. at 237 (emphasis added).

As Judge Posner has observed, employees and interest groups who are politically opposed to unions often bring litigation seeking to establish burdensome restrictions on a union's procedure for collecting agency fees, simply to harm the union. *See Gilpin v. AFSCME*, 875 F.2d 1310, 1313, 1316 (7th Cir.) (Posner, J.) ("the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union," and the remedy they seek is designed "to weaken and if possible destroy [it]"), *cert. denied*, 110 S.Ct. 278 (1989). *Grunwald* is an illustration of this problem. Judge Kozinski put it well:

[T]he union has come up with a procedure that accommodates the legitimate interests of the minority, while preserving the union's right to collect agency fees without undue administrative costs. Tyranny of the majority this simply is not.

I do see, however, a different kind of tyranny in this case—the tyranny of the modern lawsuit. In a dispute over interests that are, in my judgment, adequately served and in any event minuscule, the plaintiffs have managed to impose on the defendants very substantial litigation costs. Win, lose or draw, the union will have spent a substantial chunk of the funds collected and earmarked for representation. Moreover, the majority's ruling will impose on the union a burden vastly out of proportion to any benefits plaintiffs may gain by getting their \$8 a month starting in September rather than December.

We do the judicial system, and the society it serves, serious harm when we countenance such *bagatelle* litigation. [917 F.2d at 1232-33 (dissenting opinion)].

Cases such as *Gilpin* and *Grunwald* illustrate how important it is that in fleshing out the procedures required by *Hudson* the courts limit their intervention to what is necessary for "preventing compulsory subsidization of ideological activity by employees who object thereto," *Hudson*, 475 U.S. at 302, and that in pursuing that end care is taken not to "restrict[] the Union's ability to re-

quire every employee to contribute to the cost of collective-bargaining activities." *Id.*

Judge Kozinski was correct in perceiving that, at least where an individual's compelled contributions are held in escrow pending resolution of any objections, to require in addition an advance reduction and a pre-collection notice would not advance "[any] constitutional right . . . at all," *Grunwald*, 917 F.2d at 1233 n.5 (dissenting opinion), and would obstruct the union's right "to collect from everyone in the unit a pro rata share of the funds it expends on representational activities, and to do so in an orderly and cost-efficient manner," *id.* at 1232.

Nothing in *Hudson* authorizes the courts to impose such requirements on unions or state bars.

#### CONCLUSION

The Court of Appeals' holding that an advance reduction of dues is not required where an objector's dues are held in escrow pending resolution of an objection should be affirmed. The Court of Appeals' holding that notice need not always precede the initial collection of dues should also be affirmed; or, in the alternative, if that holding is reversed this Court should make clear that pre-collection notice would not be required where, as in *Grunwald*, the money collected from potential objectors is held in escrow until objections have been filed and resolved.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

October Term, 1990

**ROBERT E. GIBSON,**

*Petitioner,*

v.

**THE FLORIDA BAR, et al.,**

*Respondents.*

**On Writ of *Certiorari* to the United States  
Court of Appeals for the Eleventh Circuit**

**BRIEF OF THE STATE BAR OF WISCONSIN  
*AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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IN THE  
**Supreme Court of the United States**

October Term, 1990

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ROBERT E. GIBSON,

*Petitioner,*

v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

---

**On Writ of *Certiorari* to the United States  
Court of Appeals for the Eleventh Circuit**

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**BRIEF OF THE STATE BAR OF WISCONSIN AS  
*AMICUS CURIAE* IN SUPPORT OF RESPONDENTS**

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By consent of the parties,<sup>1</sup> the State Bar of Wisconsin ("Wisconsin Bar") submits this brief in support of respondents, who seek affirmance of the judgment of the United States Court of Appeals for the Eleventh Circuit that the Florida Bar's procedures for handling objections to its use of compulsory bar dues to fund political lobbying substantially satisfies the constitutional requirements enunciated by this Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).<sup>2</sup>

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<sup>1</sup>Consistent with this Court's Rule 37.3, the written consents of the parties accompany the filing of this *amicus* brief.

<sup>2</sup>While the Eleventh Circuit held that the Florida Bar's procedures were in substantial compliance with *Hudson*, the court also held that the Bar's method of calculating interest generated from dissenters' dues from the date that the Bar was notified of the dissenter's objection was faulty. Accordingly, the court ordered that "to protect against the danger that the objecting members' funds will be used . . . to finance the

(Footnote continued on following page)



### INTEREST OF AMICUS CURIAE

The Wisconsin Bar has been at the forefront of integrated bar issues since its integration rule was upheld in the face of a First Amendment challenge in *Lathrop v. Donohue*, 367 U.S. 820, *reh'g denied*, 368 U.S. 871 (1961). The Wisconsin Bar is now among 33 integrated bars across the country facing actual or potential damage claims for past conduct. Should the Court reach the question of past damages in this matter, the Wisconsin Bar's experience to date in litigating such claims brings a unique perspective to this issue.

The Wisconsin Bar was established as an integrated bar under interim rules promulgated by the Supreme Court of Wisconsin in 1956. Two years later integration became permanent. Despite receiving the imprimatur of this Court in *Lathrop*, the Wisconsin Supreme Court nevertheless was prompted in 1988 to suspend its long-standing integration rule by a decision of the District Court for the Western District of Wisconsin declaring the rule unconstitutional. See *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis.), *rev'd sub nom. Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 204 (1989).

During the pendency of the *Levine* case, this Court granted *certiorari* in *Keller v. State Bar of California*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 46 (1989).<sup>3</sup> In *Keller*, this Court held for the first time that unified bar associations are subject to the same restrictions on the use of mandatory dues as those imposed on labor unions. While

(Footnote continued from previous page)

Bar's political activity, the Bar would have to calculate interest as of the date that payment of the members' bar dues was received." *Gibson v. The Florida Bar*, 906 F.2d 624, 632 (11th Cir. 1990) ("Gibson II").

<sup>3</sup>The *Keller certiorari* petition was granted on the same day the *Levine certiorari* petition was denied. See \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 204 (1989).

the *Keller* case was under submission to this Court, both the *Levine* case and a second case against the Wisconsin Bar, *Crosetto v. The State Bar of Wisconsin and Stephen L. Smay*, Case No. 88-C-433-C (W.D. Wis.), were stayed.

The *Crosetto* case is a purported class action which demands, among other relief, some \$500,000 in "compensatory damages" and \$600,000 in punitive damages. The plaintiffs' theories in *Crosetto* include allegations that the Wisconsin-Bar intentionally violated plaintiffs' constitutional rights by, for example, funding allegedly political and ideological speech out of mandatory dues, and seeking to delay the institution of a dues reduction plan for sums spent on legislative activities.

Following this Court's decision in *Keller*, the *Levine* case was dismissed by the district court on February 22, 1991. At the time *Levine* was dismissed, the Wisconsin Supreme Court had not reinstated (and to this date has not reinstated) the mandatory membership rule,<sup>4</sup> and the *Levine* plaintiffs sought only declaratory and injunctive relief. Accordingly, the district court held that there was no justiciable case or controversy:

Plaintiffs are not seeking any damages for injuries they may have suffered in the past from the bar's use of their mandatory dues. Whether they will suffer any injury in the future is solely a matter of conjecture. It depends on the bar's adopting and presenting a petition for reinstating the mandatory bar membership requirement and on the [Wisconsin

<sup>4</sup>By order dated March 6, 1991, the Wisconsin Supreme Court stated that notwithstanding its inherent power to reinstitute a mandatory bar, it would not do so "until, in response to a petition filed by the State Bar or other interested person or on the Court's own motion, the Court holds a public hearing and considers any legal requirements necessary for the governance of a mandatory bar, including *Keller v. State Bar of California* . . . that evolved subsequent to the inception of *Levine, et al. v. Heffernan, et al.*" 64 Wis. Law. 39 (May 1991). Following careful and extensive discussion, the Wisconsin Bar petitioned the Wisconsin Supreme Court on May 16, 1991 to reinstate the mandatory membership rule.

Supreme] Court's agreeing to the proposal. Even if this occurs, whether plaintiffs will suffer a constitutional injury of the sort they allege here is another matter for conjecture. If the scheme proposed by the bar and approved by the court for ensuring that bar dues are not used for constitutionally impermissible reasons meets the standards set in *Keller*, it is improbable that plaintiffs will have any basis for maintaining a suit against these defendants.

*Levine, et al. v. Heffernan, et al.*, No. 86-C-578-C (W.D. Wis. Feb. 21, 1991).

The *Crosetto* case, however, marches on. On March 29, 1991, the Wisconsin Bar (and the individual defendant, the Bar's Executive Director) filed a comprehensive motion for summary judgment in *Crosetto*. That motion seeks, *inter alia*, dismissal of plaintiffs' claims for "monetary damages" based on conduct which substantially preceded the *Keller* decision on three separate grounds:

- (1) That the Wisconsin Bar and its Executive Director are entitled to qualified immunity;
- (2) That the *Keller* decision should not be applied retroactively; and
- (3) That, in any event, plaintiffs were required, and failed to make the contemporaneous objections necessary to allow them to now assert a right to any dues recovery.

The Wisconsin Bar's motion is now fully briefed and under consideration.<sup>5</sup>

*Amicus curiae* Wisconsin Bar is aware that this Court may never reach issues of past damages or recovery in this appeal. If

<sup>5</sup>The Wisconsin Bar did not advance an Eleventh Amendment defense as part of its summary judgment motion in light of the district court's earlier finding in *Levine* that the structure and activities of the Wisconsin Bar do not support that defense. *Levine*, 679 F.Supp. at 1487-88. But see *Bishop v. State Bar of Texas*, 791 F.2d 435, 438 (5th Cir. 1986). Accordingly, *amicus curiae* Wisconsin Bar will not address the Florida Bar's entitlement to that defense in this case. Instead, this brief will address other defenses to damage claims for past conduct.

for whatever reason, however, this Court does reach these issues, the Wisconsin Bar requests that the positions and arguments stated herein be considered, as this Court's decision on these issues could prevent a flood of suits brought by "dissenters" against the Wisconsin Bar or any of the 32 other integrated bars around the country.

### SUMMARY OF ARGUMENT

In *Lathrop v. Donohue*, this Court upheld the concept of an integrated bar against constitutional challenge but declined to address the issue of whether ideological or political speech or activities could be funded with mandatory dues. 367 U.S. at 843-48.<sup>6</sup> In *Keller v. State Bar of California*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 2228 (1990), this Court, applying its analysis from the union cases, held for the first time that the use of mandatory dues to fund political or ideological speech or activities was restricted. Thus, the Court held that mandatory dues could be used to fund political or ideological activities which are germane to the goals of "regulating the legal profession and improving the quality of legal services." *Keller*, 110 S. Ct. at 2236. Finally, the Court held that a dues reduction plan similar to the one approved in *Chicago Teachers Union, Local No. 1 v. Hudson*, would be sufficient to accommodate the constitutional rights of dissenters. \_\_\_ U.S. at \_\_\_, 110 S. Ct. at 2237. In *Keller*, however, this Court did not address a number of other issues, such as whether its decision

<sup>6</sup>Significantly, the Court declined to do so on the same day it held that labor unions could not use compelled dues for such purposes. See *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). Although *Street* was a case of statutory construction, the Court expressly construed the statute to avoid "serious doubt" of its constitutionality. *Id.* at 749. Thus, *Street* "necessarily provide[d] some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments." *Lehnert v. Ferris Faculty Ass'n*, \_\_\_ U.S. \_\_\_, 1991 U.S. Lexis 3017, \*17 (May 30, 1991).



should be applied retroactively, or if applied retroactively, whether mandatory bars would be entitled to defenses based either on the giving of notice or their reliance on the state of the law.

The Wisconsin Bar respectfully submits that if this Court addresses the issue of retroactive relief, it should now declare that *Keller* is not to be applied retroactively and that mandatory bars were not acting at their financial peril in failing to anticipate the *Keller* decision. *Keller* declared new law, and established a new constitutional standard; to apply it retroactively to "create" a plethora of damage or restitutionary claims by dissenters (declared or undeclared) would work an extreme hardship on mandatory bars and would be manifestly unjust.

## ARGUMENT

### I.

#### THE COURT'S DECISION IN *KELLER* SHOULD NOT BE APPLIED RETROACTIVELY

As a general rule, judicial decisions are to be applied retroactively. *Solem v. Stumes*, 465 U.S. 638, 642 (1984). In order to ameliorate the sometimes harsh results which would flow from the mechanical application of this principle, however, this Court has recognized certain exceptions to the general rule. *Anton v. Lehpamer*, 787 F.2d 1141, 1143 (7th Cir. 1986) (citing *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

In *Chevron v. Huson*, 404 U.S. 97 (1971), this Court set forth a three-prong test to be used in determining whether a judicial decision should be applied retroactively.

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was

not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

*Id.* at 106-07 (citations omitted).

Clearly, the first prong of the *Chevron* test is met. The holding of *Keller* established a new principle of law both generally and specifically: (1) generally, *Keller* established for the first time that the First Amendment cases in the union context are applicable to integrated bars, and (2) specifically, *Keller* altered, to at least some degree, the purposes for which an integrated bar may undertake political or ideological activities. *See Keller*, 110 S. Ct. at 2235-37.<sup>7</sup>

Moreover, it is plain on the face of the *Keller* decision that the application of its standards remains uncertain. *See id.* at 2237 ("Precisely where the line falls between those state bar activities in which the officials and members of the bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern."). *Cf. Lehnert v. Ferris Faculty Ass'n*, *supra* note 6. The *Keller* decision also left open to question what procedures must be instituted to protect the First Amendment interests recognized in that decision. *See Keller* at 2237-38

<sup>7</sup>The district court in *Levine*, *supra*, in an unpublished order, applied the *Chevron* test to find the claims of dissenters for past relief in that case were barred. *See Levine, et al. v. Heffernan, et al.*, No. 86-C-578-C (W.D. Wis. May 6, 1988).



("Whether one or more alternative procedures would likewise satisfy the obligation are better left for consideration upon a more fully developed record."').<sup>8</sup>

Integrated bar associations should not be penalized for not being prescient. The procedural rights imposed in *Keller* were not "clearly foreshadowed," nor are they settled to this day.

Indeed, this Court rejected retroactive application under just such a set of circumstances in *Florida v. Long*, 487 U.S. 223 (1988). In that case, the State of Florida adopted changes to its procedures for funding its pension plans in order to comply with an earlier Supreme Court decision that invalidated sex-differentiated contributions. See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). Five years after *Manhart* this Court held that not only were sex-differentiated contributions unallowable, but sex-differentiated benefits were similarly forbidden. See *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). In the wake of *Norris*, Florida adopted a plan that resulted in the same benefits being paid to all pensioners, regardless of sex. The state was then sued by pensioners who argued that the unisex benefits plan should have been adopted immediately following the Court's decision in *Manhart*. *Long*, 487 U.S. at 227-28.

In holding that liability could not be imposed against the state for "pre-*Norris* conduct," the Court noted that prior to its decision in *Norris*, there was some doubt regarding the parameters of the *Manhart* requirements. *Id.* at 231-33. Given these uncertainties, the Court found that retroactive imposition of liability would

<sup>8</sup>Indeed, it was not until the Court's 1986 decision in *Hudson*, nearly ten years after its decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), that the Court gave any definition of the contours of the procedures required in the union dues context. Even then, the requirements imposed upon unions by the Court's decision were far from clear. It is apparent from the Court's decision in *Keller* that these issues are still evolving. See *Keller*, 110 S. Ct. at 2237.

be inappropriate. *Id.* at 235. For the same reason—that is, doubt about the application of the First Amendment to the use of mandatory bar dues, as well as the uncertain parameters of acceptable procedures to protect the rights of dissenting bar members—retroactive imposition of liability for pre-*Keller* conduct would be inappropriate in the integrated bar context.

The second prong of the *Chevron* test has no real application in this context. As this Court has stated, retroactive application is appropriate only where necessary "to deter deliberate violations [of] or grudging compliance [with]" the new rule. *Long*, 487 U.S. at 230. There is nothing to suggest that integrated bars have purposely failed to comply with the law or will do so only if "pushed." Indeed, in light of the uncertainty of the law prior to *Keller*, any such suggestion would be unwarranted. See also Part II, *infra*.

Finally, it is plain that a retroactive monetary award or refund would work a substantial hardship on integrated bars within the meaning of the third prong of the *Chevron* test. If retroactive relief were allowed, integrated bars would arguably be liable for the refund of dues to an as yet undeterminable number of lawyers for an as yet undeterminable number of years.

In sum, under each of the three prongs set forth in *Chevron*, the decision in *Keller* should not be applied retroactively.

## II.

### THE DOCTRINE OF QUALIFIED IMMUNITY PROTECTS INTEGRATED BARS FROM CLAIMS FOR PAST DAMAGES

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court held that in an action brought under 42 U.S.C. § 1983, defendants "are shielded from liability" by the doctrine of qualified immunity

"insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Although this Court did not fully explain in *Harlow* what it meant by the phrase "clearly established constitutional rights," see discussion *Benson v. Allphin*, 786 F.2d 268, 275-76 (7th Cir.), cert. denied, 479 U.S. 848 (1986), subsequent decisions have fleshed out the meaning of that phrase. In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), this Court explained that the cases construing *Harlow* "establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable [official] would understand that what he is doing violates that right." In other words, "in light of preexisting law the unlawfulness must have been apparent." *Id.* (citations omitted).<sup>9</sup>

Under this standard, it is manifest that the constitutional rights of mandatory bar dissenters were not "clearly established" under the law prior to this Court's decision in *Keller*. On the contrary, even the basic issue of the applicability of First Amendment protection to lawyers in an integrated bar setting was open to question. Prior to *Keller*, *Lathrop* was "the last Supreme Court decision squarely to address the First Amendment rights of lawyers in an integrated bar." *Gibson v. The Florida Bar*, 798 F.2d 1564, 1567 (11th Cir. 1986) ("*Gibson I*"). The *Lathrop* Court, however, expressly declined to consider whether the First Amendment might be implicated by an integrated bar's use of mandatory dues to support its legislative program, and Justice Harlan argued in an emphatic concurring opinion that any First Amendment impingement was at best "chimerical." *Lathrop*, 367 U.S. at 864.

<sup>9</sup>This rule was more pointedly articulated by the Court in *Malley v. Briggs*, 475 U.S. 335, 341 (1986), when it observed that the defense of qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."

Thus, until *Keller*, the question of whether and how the First Amendment standards set forth in the union cases were applicable to integrated bars remained open. See, e.g., *Keller v. State Bar of California*, 47 Cal. 3d 1152, 255 Cal. Rptr. 542 (1989) (for the purposes of First Amendment analysis, integrated bar would be viewed as a governmental agency rather than a labor union); *Falk v. State Bar of Michigan*, 418 Mich. 270, 342 N.W.2d 504 (1983) (integrated bar's use of mandatory dues in connection with political activities advances a substantial governmental interest which outweighs any infringement of dissenters' First Amendment interests). While it is true that a few—and for the most part recent—lower court decisions since *Lathrop* had concluded that the First Amendment does restrict an integrated bar's use of mandatory dues (most notably the Eleventh Circuit in *Gibson I* and the United States District Court in *Arrow v. Dow*, 544 F. Supp. 458 (D.N.M. 1982)), the United States Supreme Court "establish[ed] for the first time [in *Keller*] that the principles it previously had developed for the permissible use of compulsory union dues are equally applicable for the use of mandatory bar dues." *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 624 (1st Cir. 1990) (emphasis supplied). Given the uncertainty of the law prior to *Keller*, the collection and use of mandatory bar fees can hardly be said to have violated dissenters' "clearly established" constitutional rights.

The doctrine of qualified immunity is designed to relieve officials "from having to decide, at their financial peril, how judges will balance these issues [of constitutional rights] in years to come. Governmental employees must obey the law in force at the time but need not know that in the fight between the broad and narrow readings of precedent the broad reading will become ascendent." *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991). Accordingly, this Court should make clear, should it reach the question of relief for past conduct, that in light of the uncertainty of the law prior to *Keller*, the doctrine of qualified immunity is available to protect integrated bars from such claims.



## III.

A "CONTEMPORANEOUS OBJECTION" SHOULD BE A  
CONDITION PRECEDENT TO ANY CLAIM FOR PAST  
DAMAGES

In any claim for a refund of mandatory dues collected and expended by a union for conduct allegedly prohibited by the First Amendment, a plaintiff must establish, as a threshold matter, that he made contemporaneous objections to the use of his mandatory dues for each year in question. *See Hudson*, 475 U.S. at 305 n.16; *Abood*, 431 U.S. at 237-41; *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 118-19 (1963). In other words, "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *International Ass'n of Machinists v. Street*, 367 U.S. at 774.

The rationale for requiring a contemporaneous objection is manifest. "The union receiving money extracted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." *Id.* The burden imposed on the dissenting dues payor is a slight one. The member need not make an objection to each specific expenditure that he finds objectionable; rather, "it is enough that he manifests his opposition to *any* political expenditures . . ." *Allen*, 373 U.S. at 118 (footnote omitted) (emphasis in original). As this Court has recognized, the lack of a requirement that the dissenter make his objection known would encourage "free riders"—those who would attempt to profit from the objections of others, while themselves remaining silent. *Street*, 367 U.S. at 774.

Absent such an objection—particularly given the nature of their vocal and legally sophisticated constituencies (*i.e.*, lawyers)—mandatory bars had a right to spend dues in ways that were fully known to (or knowable by) each member. Indeed, it does

not require much foresight to see the result of not imposing such a requirement: bar members who in all probability had never considered the issue would suddenly give voice to their new-found "secret objection" to the expenditure of their dues, and line up for their portion of a dues rebate windfall. Thus, any would-be plaintiff seeking relief for past damages against an integrated bar should also be required to establish that he made a contemporaneous objection to the use of his mandatory dues.<sup>10</sup>

## CONCLUSION

As manifested by the *Gibson* case itself, mandatory bars such as the Florida Bar and the Wisconsin Bar have been subjected to endless, and at times harassing, litigation over the last ten years. Finally, in *Keller*, this Court attempted to state and clarify substantive First Amendment principles as they apply to mandatory bars.

However, this Court did not address in *Keller* the implications of its decision on pending (or future) claims for damages based on pre-*Keller* conduct. It may be that this case, as well, will not present the Court with the opportunity to comment on claims for past damages or refunds.

<sup>10</sup>As the District Court in *Levine* stated in its order denying the *Levine* plaintiffs' motion to certify a class which included lawyers who had not made contemporaneous objections to the use of their dues:

[p]laintiffs' claim that they are constitutionally entitled to a refund of bar dues is premised entirely on [*Abood*, *Street* and *Hudson*]. I see no reason why the requirement that dues payors make known their objections to the expenditure of their dues for political purposes should not be applied to the bar context as well. *There is no greater reason to presume that a lawyer objected to certain uses of his Bar dues than to presume that an employee objected to certain uses of union dues. The interests protected are virtually identical, and the requirements for voicing dissent should be identical as well.*

*See Levine v. Heffernan, et al.*, No. 86-C-578-C (W.D. Wis. May 6, 1987) (emphasis supplied).



If, however, this Court does address the issue of relief for past "violations," *amicus curiae* Wisconsin Bar respectfully requests that this Court take the opportunity to declare that the *Keller* case should be applied only prospectively and that principles of qualified immunity and the requirement of a contemporaneous objection apply with full force and effect in the integrated bar context.

Dated this 6th day of June, 1991.

Respectfully submitted,

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**In The**  
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ROBERT E. GIBSON,

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vs.

THE FLORIDA BAR, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States  
Court Of Appeals For The Eleventh Circuit**

**RESPONDENTS' SUPPLEMENTAL BRIEF**

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**RESPONDENTS' SUPPLEMENTAL BRIEF**

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The purpose of this supplemental brief is to present to the Court the Florida Supreme Court decision in the case of *The Florida Bar Re: David P. Frankel*, Case No. 76,853 (June 13, 1991). A copy of the opinion is included in the Appendix to this brief.

In its initial brief The Florida Bar argued that advance reduction of dues was impracticable in Florida for two reasons. The first of those reasons was that The Florida Bar does not intentionally budget funds for non-chargeable expenditures. With the *Frankel* decision that reason now rests not only on practice, but on law.



In the *Frankel* decision, the Florida Supreme Court held that the Bar was restricted by its mandate from engaging in *any* lobbying activities, whether funded by compulsory dues or not, which did not meet stringent criteria. Issues are subject to Bar lobbying if they fall into the following categories:

- (1) Questions concerning the regulation and discipline of attorneys;
- (2) Matters relating to the improvement of the functioning of the courts, judicial efficacy, and efficiency;
- (3) Increasing the availability of legal services to society;
- (4) Regulation of attorneys' client trust accounts; and
- (5) The education, ethics, competence, integrity and regulation as a body, of the legal profession.

[App. 3] As to matters not falling within those specific categories, the Bar may lobby only when it meets the following three-pronged criteria:

- (1) That the issue be recognized as being of great public interest;
- (2) That lawyers are especially suited by their training and experience to evaluate and explain the issue; and
- (3) The subject matter affects the rights of those likely to come into contact with the judicial system.

[App. 4]

The Court analyzed this Court's opinion in *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), and concluded that the foregoing criteria, as applied, did not extend beyond the bounds of *Keller*. The Court noted that its purpose in adopting the criteria was to apply the *Abood*<sup>1</sup> rationale. In addition, the Court reaffirmed its earlier holding that any member of The Florida Bar has standing to challenge a position taken by the Bar before the Florida Supreme Court and that available relief includes both dues rebate and injunction.

In his amicus curiae brief Mr. Frankel cites eight specific legislative positions taken by The Florida Bar in 1990. Mr. Frankel challenged the same eight positions in his case before the Florida Supreme Court. The Court held all eight positions to be outside the scope of permissible lobbying activities by The Florida Bar, ordered a rebate of the appropriate portion of Mr. Frankel's dues, and enjoined the Bar from further lobbying with respect to such issues.

Advance reduction of dues serves no purpose in a state like Florida where the Bar is without authority to engage in political or ideological activities which are outside the scope of *Abood* and *Keller*. Since the Bar is prohibited from budgeting for non-chargeable activities, there is nothing to reduce in advance. Of course, the Bar's decision as to what is or is not chargeable is not infallible, but dissenters have effective means of challenging such decision either through the escrow/arbitration procedure or through direct petition to the Supreme Court.

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<sup>1</sup> *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The *Frankel* decision also has a significant impact upon the petitioner's challenge to The Florida Bar's objection procedure. That procedure does not require that a dissenter indicate his or her position on a given issue, only that he or she designate the issues alleged to be non-chargeable. Petitioners insist they can only be required to make a general objection to all non-chargeable uses. Such a procedure might be workable in jurisdictions which intentionally budget for non-chargeable purposes. Since Florida is prohibited from budgeting for non-chargeable purposes, the only reason for the objection procedure is to indicate that a dissenter disputes the Bar's conclusion that a given issue is chargeable. Thus, the type of general objection which petitioners would like to make would be meaningless.

Respectfully submitted

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APPENDIX  
SUPREME COURT OF FLORIDA

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No. 76,853

---

THE FLORIDA BAR

Re DAVID P. FRANKEL

[June 13, 1991]

PER CURIAM.

David P. Frankel (Frankel), a member in good standing of The Florida Bar, petitions this Court to enjoin The Florida Bar, both pendente lite and thereafter, from engaging in certain allegedly impermissible legislative lobbying positions taken by the board of governors. In addition, Frankel requests a pro rata refund of that portion of his mandatory dues applicable to the impermissible lobbying positions. As a creation of this Court, The Florida Bar is under our supervision and subject to our regulation.<sup>1</sup> We grant Frankel's requested injunction, although not pendente lite, and his requested dues refund.

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<sup>1</sup> Any member of The Florida Bar in good standing may question the propriety of any legislative lobbying position taken by the board of governors by filing a timely petition with this Court. *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), *cert. denied*, 111 S.Ct. 371 (1990).

## App. 2

The board of governors adopted the following lobbying positions and published them in *The Florida Bar News*:

6. Supports the recommendations of The Florida Bar Commission for Children relating to:
  - a. Expansion of the women, infants and children (WIC) program.
  - b. Extension of Medicaid coverage for pregnant women.
  - c. Full immunization of children.
  - d. Establishing children's services councils.
  - e. Family life and sex education/teen pregnancy prevention.
  - f. Increasing Aid to Families with Dependent Children.
  - g. Enhanced child-care funding and standards.
  - h. Creation of children's needs consensus estimating conference.
  - i. Establish family court divisions in each circuit.
  - j. Termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants.
  - k. Guardians Ad Litem - dissolution and custody.
  - l. Establish foster care review boards.
  - m. Eliminate select public disclosure exemptions in child abuse cases.
  - n. Development of juvenile offender rehabilitation and treatment programs.

## App. 3

*The Florida Bar News*, Oct. 15, 1990, at 4, col. 2. In his petition, Frankel challenges lobbying positions 6.a. through 6.h. as being beyond the scope of permissible bar lobbying activities. He makes no claim as to the propriety of the other positions.

To determine the propriety of the contested bar lobbying positions, we turn to *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), *cert. denied*, 111 S.Ct. 371 (1990). There, we adopted the Judicial Council of Florida's<sup>2</sup> recommendation that the following areas clearly justify bar lobbying activities:

- (1) Questions concerning the regulation and discipline of attorneys;
- (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
- (3) increasing the availability of legal services to society;
- (4) regulation of attorneys' client trust accounts; and
- (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

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<sup>2</sup> In *The Florida Bar re Schwarz*, 526 So.2d 56 (Fla. 1988), our first *Schwarz* decision, we declined to decide whether any existing specific lobbying activity of The Florida Bar was improper. Rather, we referred the matter to the Judicial Council of Florida for its comments and recommendations. We adopted the council's recommendations as guidelines for determining permissible bar lobbying activity in our second *Schwarz* decision. *Schwarz*, 552 So.2d at 1095.



552 So.2d at 1095. We also adopted the council's recommendation that the following additional criteria be used to determine permissible bar lobbying activities when the legislation falls outside of the above specifically identified areas:

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

*Id.*

The Florida Bar carries the burden of proof in establishing the propriety of its lobbying activities. *Schwarz; Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); see R. Regulating Fla. Bar 2-9.3. We fail to see how the contested lobbying positions fall within the five areas which clearly justify bar lobbying activities. The bar contends that its involvement in children's matters clearly justifies advocacy of the contested positions due to their relationship to the ethics and integrity of the legal profession. Any such interpretation of the fifth guideline, however, is strained at best, and we reject the bar's analysis. Thus, we must examine the propriety of the contested lobbying positions under the three additional criteria set forth in *Schwarz*.

Before analyzing the propriety of the contested bar lobbying positions under the three additional criteria of *Schwarz*, we must first address Frankel's claim that, in

light of *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), the additional criteria violate the first and fourteenth amendment rights of dissenting bar members to be free from compelled speech and association. Because we find the additional criteria set forth in *Schwarz* to be consistent with the pronouncement of the Court in *Keller*, we reject Frankel's argument

Relying on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*, 466 U.S. 435 (1984), *Keller* held that a compulsory state bar association may constitutionally fund with mandatory dues only those activities "germane" to its purpose, i.e., activities necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. This Court in *Schwarz* adopted guidelines to define those activities "germane" to the purpose of The Florida Bar, but, in contrast to *Keller*, delineated that purpose as to improve the administration of justice and advance the science of jurisprudence. See *In re Amendment to Integration Rule*, 439 So.2d 213 (Fla. 1983). We recognize that *Keller* reversed the California Supreme Court's decision in *Keller v. State Bar of California*, 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal.Rptr. 542 (1989), wherein it held that the state bar association could permissibly lobby on activities "germane" to the identical purpose defined in *Schwarz*. Upon first glance that decision may appear to have an impact on *Schwarz*. We find the California Supreme Court's decision, however, distinguishable from *Schwarz*.

To begin with, the California Supreme Court analogized its state bar association to a governmental agency and concluded that the first amendment restraints placed

on the expenditure of compulsory union dues, as set forth in *Abood*, were inapplicable. In *Keller* the United States Supreme Court rejected this analogy and based its decision in part upon *Abood*. This Court likewise has adopted *Abood*'s rationale and applied it in determining permissible lobbying activities of The Florida Bar. See *In re Amendment to Integration Rule; Schwarz*. We adopted the guidelines in *Schwarz*, to define the bar's purpose of improving the administration of justice and advancing the science of jurisprudence, in keeping with *Abood*.

In addition, we do not find a measurable difference between allowing bar lobbying activities for the purpose of regulating the legal profession or improving the quality of legal services and allowing lobbying activities for the purpose of improving the administration of justice or advancing the science of jurisprudence as defined in *Schwarz*. This conclusion is consistent with the United States Supreme Court. *Keller*, 110 S.Ct. at 2236 ("Simply putting this language alongside our previous discussion of the extent to which the activities of the State Bar may be financed from compulsory dues might suggest that there is little difference between the two."). *Keller* only found fault with the California Supreme Court's broad definition of the latter terms as evidenced by the activities which it found to be permissible lobbying activities, essentially all proposed legislation. On the other hand, in *Schwarz* we expressly stated that our definition of those purposes was not as broad as that given by the California Supreme Court and adopted guidelines to limit bar lobbying activities accordingly. *Schwarz*, 552 So.2d at 1096. Thus, after a careful analysis of *Keller*, we conclude that it does not require us to revisit the adoption of the

additional criteria in *Schwarz*, as they are consistent with *Keller*'s holding.

We now return to our analysis of the propriety of the contested lobbying positions under the three additional criteria of *Schwarz*. With regard to the first criterion, neither party disputes that children's issues are of great public interest, and we agree. Whether the contested lobbying positions satisfy the second criterion, i.e., that lawyers are especially suited by their training and experience to evaluate and explain the issue, is more problematical. The bar argues that its involvement in children's issues – evidenced by a special issue of The Florida Bar Journal solely devoted to children's topics; The Florida Bar Commission for Children (composed of lawyers, physicians, community leaders, legislators, and business executives) which for two years examined children's issues, societal problems, and the role of lawyers in contributing to the solution of these problems and recommended advocacy of the legislative positions at issue in the instant case; and the bar's moral obligation to Florida's children – verifies the suitability by training and experience within the legal profession to evaluate and explain the contested lobbying positions.

Although we commend The Florida Bar for its involvement with children's issues and find the positions certainly laudable, the bar has failed to prove that advocacy of the contested lobbying positions satisfy the second criterion. The merit of the position or the unanimity in its support is not the standard by which to determine the propriety of bar lobbying activities on that position.<sup>3</sup>

<sup>3</sup> The Florida Bar, in its response to Frankel's petition, points out that only nine of 45,156 bar members objected to the specific lobbying positions at issue in the case at bar.



The bar has no specialized expertise regarding the subjects of expansion of the women, infants, and children program; extension of Medicaid coverage for pregnant women; full immunization for children; establishing children's services councils; family life and sex education/teen pregnancy; increasing aid to families with dependent children; enhanced child-care funding and standards; or creation of a children's needs consensus estimating conference. Nor has the bar obtained such expertise through publication of a special Journal issue or by establishing committees to study the area. Because the bar's lobbying positions 6.a. through 6.h. do not fall within the *Schwarz* guidelines, we find them to be outside the scope of permissible bar lobbying activities.<sup>4</sup>

We next address Frankel's claim that The Florida Bar must recognize its members' general objections to the use of their compulsory dues to fund legislative lobbying activities. Frankel claims that the bar's objection procedure, which requires objections on an issue-by-issue basis, forces dissenters to reveal their own beliefs and political positions in violation of *Abood*. We disagree.

Initially, we note that Frankel's general objection, which he claims is sufficient under *Abood*, merely states that "I hereby demand that no portion of my compulsory dues be used directly or indirectly to fund or support any legislative lobbying or amicus filings by or on behalf of The Florida Bar." Such an objection is insufficient under

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<sup>4</sup> Because The Florida Bar's lobbying positions fail to satisfy the second additional criterion of *Schwarz*, we need not address whether its positions satisfy the third additional criterion.

*Abood* because it is directed against all lobbying activities instead of only those activities which fall beyond the scope of permissible bar lobbying activities.

Moreover, the bar's objection procedure has been upheld in *Gibson v. The Florida Bar*, 906 F.2d 624, 632 (11th Cir. 1990), *cert. granted*, 111 S.Ct. 1305 (1991), which addressed this issue and stated:

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." *Chicago Teachers [Union v. Hudson]*, 475 U.S. at 306, 106 S.Ct. at 1075 [1986] (citing *Abood*, 431 U.S. at 239-40 & n. 40, 97 S.Ct. at 1801-02 & n. 40). This burden "is simply the obligation to make his objection known." *Id.* at 306 n. 16, 106 S.Ct. at 1075 n. 16. The affirmative objection requirement here is within the scope of this obligation. It merely requires the objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue.

We agree with the rationale of *Gibson*. Dissenters only need to object on the basis that the bar's announced lobbying position is outside the scope of its permissible lobbying activities. The procedure does not require them to reveal their own ideological positions.

Nor is The Florida Bar's objection procedure overly burdensome on the dissenting bar member, another concern expressed in *Abood*. The board of governors is required to publish its lobbying positions in the issue of The Florida Bar News immediately following the meeting



at which it adopts those positions. R. Regulating Fla. Bar 2-9.3(b). Bar members need only read the lobbying positions adopted by the board of governors in The Florida Bar News and, if they believe that the positions are outside the *Schwarz* guidelines, submit a written objection.

Lastly, there remains the question of determining the appropriate remedy under the circumstances of this case. Certainly, Frankel is entitled to a refund of his bar dues amounting to a proportionate share of the amount spent on the contested lobbying activities plus interest at the statutory rate. *See Gibson*, 906 F.2d 624; R. Regulating Fla. Bar 2-9.3. However, Frankel additionally petitions this Court to enjoin the bar, both pendente lite and thereafter, from lobbying on these issues. We grant the injunction but not pendente lite.<sup>5</sup>

This Court has yet to address whether a dissenting bar member may enjoin the bar from lobbying on positions outside the guidelines set forth in *Schwarz*. And the Supreme Court expressly refused to consider whether a dissenting bar member could enjoin the bar from lobbying on activities not germane to the bar's purpose in

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<sup>5</sup> Pendente lite is defined as "[p]ending the lawsuit; during the actual progress of a suit; during litigation. Matters 'pendente lite' are contingent on the outcome of litigation." *Blacks' Law Dictionary* 1134 (6th ed. 1990). Because The Florida Bar indicated its intent to continue to lobby on the children's issues Frankel contested, Frankel seeks to enjoin the bar from lobbying on those positions during the pendency of these proceedings. We find that Frankel has failed to make the requisite showing to obtain the injunction pendente lite.

*Keller*.<sup>6</sup> *Keller*, however, analogized a mandatory state bar association to a compulsory union in reaching its decision. Within the context of a union-shop agreement, the Court previously has held that an injunction prohibiting a union from expending mandatory dues for political purposes would be inappropriate because nondissenting union members have an interest in stating their views "without being silenced by the dissenters." *International Association of Machinists v. Street*, 367 U.S. 740, 773 (1961); *see Aboud*.

We find that the concern expressed in *Street* is inapplicable with regard to The Florida Bar. An injunction prohibiting the bar from lobbying on a particular issue would not silence the voices of nondissenting members. The bar has many volunteer sections and political action committees through which bar members may assert their views. *See In re Amendment to Integration Rule; Schwarz*, (McDonald, J. dissenting). Indeed, these volunteer sections and committees are the appropriate vehicles for lobbying on issues that do not fall within the *Schwarz* guidelines.

Furthermore, The Florida Bar is a creation of this Court and subject to its supervision. In *Schwarz* we delineated guidelines by which to determine permissible bar lobbying activities. If a lobbying position does not fall within the guidelines set forth in *Schwarz*, it is outside the

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<sup>6</sup> *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), refused to consider the issue of whether injunctive relief would be an appropriate remedy because the California Supreme Court had not addressed the issue.

ambit of permissible bar lobbying activities. Thus, a petitioner may enjoin the bar from lobbying on that position. Under the circumstances of this case, where lobbying positions 6.a. through 6.h. neither fall under the five areas which clearly justify bar lobbying activities nor satisfy the three additional criteria by which to determine permissible lobbying activities, we enjoin The Florida Bar from lobbying on those positions henceforth from the date this opinion is final.

We therefore order that The Florida Bar refund Frankel a proportionate share of his bar dues applicable to the impermissible lobbying activities plus interest at the statutory rate from the date he paid those dues and enjoin the bar from the above-mentioned lobbying activities.

It is so ordered.

SHAW, C.J. and OVERTON, GRIMES, KOGAN and HARDING, JJ., concur. McDONALD, J., concurs specially with an opinion. BARKETT, J., concurs specially with an opinion, in which SHAW, C.J. and KOGAN, J., concur. NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., specially concurring.

I concur in the result reached by the majority opinion. I disagree only in the delineation of the scope of permissible lobbying activities of The Florida Bar. As I stated in my dissent in *The Florida Bar re Schwarz*, 552 So.2d 1094, 1098 (Fla. 1989), *cert. denied*, 111 S.Ct. 371 (1990), lobbying activities of The Florida Bar cannot extend beyond the following five designated areas:

(1) Questions concerning the regulation and discipline of attorneys;

(2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;

(3) increasing the availability of legal services to society;

(4) regulation of attorneys' client trust accounts; and

(5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

*Id.* at 1095. Contrary to the majority opinion, I believe the decision of the United States Supreme Court in *Keller v. State Bar of California*, 110 S.Ct. 2278 (1990), not only buttresses, but indeed mandates, such a conclusion.

In all other aspects, I concur with the majority opinion.

BARKETT, J., specially concurring.

I am compelled to agree that The Florida Bar's lobbying efforts in this instance will not fit within the criteria of *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), *cert. denied*, 111 S.Ct. 371 (1990), though I confess, like Cinderella's sisters, I have tried mightily to force the foot into the glass slipper. I am hopeful that the voluntary bar associations and the various sections of the Bar will take up the slack. Children, the poor, and especially poor children, have no constituency. It is only through the efforts of those who are already empowered that they can hope to compete with the interests able to represent themselves.

I would also encourage the Bar to reinitiate its lobbying efforts if it can more narrowly tailor those efforts within the *Schwarz* guidelines.

SHAW, C.J. and KOGAN, J., concur.

Original Proceeding – The Florida Bar

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for Respondent, The Florida Bar

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(5)  
No. 90-1102

Supreme Court, U.S.

FILED

OCT 10 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

ROBERT E. GIBSON,

*Petitioner,*

*v.*

THE FLORIDA BAR, *et al.*,

*Respondents.*

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

**PETITIONER'S SUPPLEMENTAL BRIEF**

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October 10, 1991

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IN THE  
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OCTOBER TERM, 1991

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No. 90-1102

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ROBERT E. GIBSON,

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v.

THE FLORIDA BAR, *et al.*,

*Respondents.*

---

On Writ of Certiorari to the  
United States Court of Appeals  
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PETITIONER'S SUPPLEMENTAL BRIEF

On September 10, 1991, after petitioner Robert E. Gibson's Reply Brief had been filed, petitioner's counsel received Respondents' Supplemental Brief calling this Court's attention to the decision in *Florida Bar Re Frankel*, No. 76,853 (Fla. June 13, 1991) (reproduced in the Appendix to Respondents' Supplemental Brief ("Supp. App.")). Pursuant to Supreme Court Rule 25.5, this supplemental brief responds to the arguments of respondents Florida Bar and its Board of Governors ("the Bar") that *Frankel* has a significant impact on two of the questions presented in this case.<sup>1</sup>

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<sup>1</sup> Respondents' Supplemental Brief does not claim that *Frankel* affects the question of whether Mr. Gibson was erroneously denied a trial as to the refund that he is due for past unconstitutional use of his compulsory bar dues. See Petitioner's Brief at 22-26; Reply Brief at 18-20.



**I. THIS COURT SHOULD CONSIDER THE BAR'S PROCEDURE AS IT WAS APPROVED BY THE DISTRICT COURT AND COURT OF APPEALS**

In *Frankel*, the Florida Supreme Court held that, as a matter of state law, the Bar has no authority to use any member's dues for "lobbying activities" which objecting members may not constitutionally be compelled to support under *Keller v. State Bar*, 110 S. Ct. 2228 (1990). Supp. App. 5-7, 11-12. The Bar argues that, because it will not budget for constitutionally nonchargeable purposes after *Frankel*, neither advance reduction of dues nor a general objection serves any purpose. The Bar therefore concludes that its objection procedures are not constitutionally inadequate for failing to provide those procedural safeguards required by *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977). See Respondents' Supp. Brief at 3-4.

However, prior to *Frankel*, the Bar budgeted and spent dues under the assumption that state law permitted it to spend compulsory dues for lobbying activities which objecting nonmembers could not constitutionally be compelled to support under *Keller*, and that it met federal constitutional requirements by adopting the rebate scheme approved by the district court and court of appeals in this case. See Respondents' Brief at 1, 7-8; *Frankel Amici* Brief 39a-41a, 49a. Mr. Gibson has been compelled to pay dues for four fiscal years under that scheme, which was approved by the Florida Supreme Court on June 2, 1988. Joint Appendix ("J.A.") 48.<sup>2</sup> Therefore, as in *Hudson*, 475 U.S. at 305 n.14, this Court should "consider the procedure as it was presented to the District Court," not just for the reasons stated in *Hudson*, but also because Mr. Gibson's rights to freedom of speech and association and first-amendment due process were violated by that scheme during the lengthy period before it was affected by the decision in *Frankel*.

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<sup>2</sup> Dues are payable in full on or before July 1 of each year. Fla. Stat. Ann., Rules Regulating the Bar, Rule 1-7.3 (West Supp. 1990).

**II. EVEN AFTER FRANKEL, THE BAR'S REBATE SCHEME DOES NOT SATISFY THE MINIMUM REQUIREMENTS OF FIRST-AMENDMENT DUE PROCESS**

*Frankel* only prohibits the Bar from spending compulsory bar dues as a matter of state law for certain "lobbying activities." Supp. App. at 11-12 (emphasis added). However, the federal constitutional prohibition is "not limited to legislative expenditures," as Respondents' Brief at 4 n.2 concedes. In *Keller*, this Court held that the first amendment to the United States Constitution does not permit the collection of compulsory bar dues for any "ideological activities not 'germane' to the purpose for which compelled association was justified," i.e., "the State's interest in regulating the legal profession and improving the quality of legal services." 110 S. Ct. at 2236 (emphasis added). The activities at issue in *Keller* included not only lobbying, but also filing of amicus briefs, debating and adopting resolutions on issues of current interest at an annual conference, and education programs. See *id.* at 2231. Cf. *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1961, 1963-64, 1977-80 (1991) (nonunion public employees' compulsory agency-shop fees cannot constitutionally be used for "promoting employee rights or unionism generally," "extra-unit litigation," and "public-relations activities").

Thus, *Frankel* does not provide a constitutionally sufficient answer to the issues presented by Mr. Gibson. His claim is against the use of his compulsory dues for *all* constitutionally nonchargeable activities, not just lobbying. See Reply Brief at 18. The Bar's budget categories for, e.g., its publications, "Public Information," and "Public Interest Programs" almost certainly include expenditures that are not chargeable under *Keller*, but are under *Frankel*. See Respondents' Brief at 7. Therefore, even if advance reduction and general objections served no purpose with regard to the lobbying activities which the Bar cannot include in calculating any member's dues, those procedural safeguards would still be required by the first amendment to protect the rights of members who, like Mr. Gibson, also object to the Bar's constitutionally nonchargeable activities *other than lobbying*.

Moreover, even assuming that *Frankel* prohibits the Bar from using *all* members' dues for *all* activities that are constitutionally nonchargeable under *Keller*, the issues presented here are not avoided. First-amendment due process would still require an independently verified calculation of the constitutionally chargeable dues amount, adequate pre-collection disclosure to all members of the basis for that amount, and that general objections must be permitted. The Bar's objection scheme, even as affected by *Frankel*, does not satisfy those requirements.<sup>3</sup>

First, if all dues are as a matter of state law limited to the constitutionally chargeable amount, then the calculation of the amount of the dues is an "advance reduction." However, *Hudson*, 475 U.S. at 309 (emphasis added), requires an "appropriately justified advance reduction." The Bar's self-serving, unverified calculation, based on a projected budget consisting of broad categories of expenses which conceal both chargeable and nonchargeable expenses, see Respondents' Brief at 7, is not appropriately justified.

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<sup>3</sup> That dissenters may challenge the Bar's decisions to take legislative positions "through direct petition to the Supreme Court" of Florida, does not provide an alternative "effective means of challenging such decision[s]," as Respondents' Supplemental Brief at 3 suggests. It would be incredibly burdensome for a dissenting member to file such a petition every time the Bar takes a legislative position. Moreover, *Hudson*, 475 U.S. at 307 n.20, "reject[ed] the Union's suggestion that the availability of ordinary judicial remedies is sufficient." While "extraordinarily swift judicial review . . . would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker," *id.* at 308 n.20 (emphasis added), the Florida Supreme Court did not finally dispose of the petition in *Frankel* until more than eight months after the Bar adopted the legislative positions challenged by that petition. See Supp. App. 1-3; *Frankel Amici* Brief 17a-18a. In the interim the Bar was permitted to continue spending dues for constitutionally nonchargeable purposes, even after the Florida Supreme Court ruled against the Bar. See Supp. App. at 10 & n.5. Thus, a direct petition to the Florida Supreme Court effectively provides no more than the "rebate" remedy condemned in *Hudson*, 475 U.S. at 305-06.

"[A]dequate justification for the advance reduction," *Hudson*, 475 U.S. at 309, includes a calculation that is based on "expenses during the preceding year" and "verification by an independent auditor," *id.* at 307 n.18; see *id.* at 310. The prior year's actual expenses must be used, because projected budgets are "too imprecise" to satisfy first-amendment concerns. *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1328 (W.D. Mich. 1986), *aff'd in part, rev'd in part, on other grounds*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part, on other grounds*, 111 S. Ct. 1950 (1991). Independent verification is necessary to provide an initial, reliable check on the self-interest of Bar officials in determining which expenses in the prior year were arguably chargeable under the criteria stated by the courts. See *Mitchell v. Los Angeles Unified School Dist.*, 739 F. Supp. 511, 514-16, *further proceedings*, 744 F. Supp. 938, 940-41 (C.D. Cal. 1990).

Second, even if state law limits all dues to the constitutionally chargeable amount, all members—"the potential objectors"—are entitled to adequate advance disclosure of the claimed factual and legal basis for the chargeability of the dues amount. See *Hudson*, 475 U.S. at 306-07. The Bar's scheme does not provide such disclosure. See Petitioner's Brief at 16-18; Reply Brief at 9-14. The Bar's assertion to members that all of its budgeted expenses are constitutionally chargeable self-evidently would not be "an adequate disclosure of the reasons why," *Hudson*, 475 U.S. at 307, objecting members are required to pay the dues amount it sets.

Third, as Respondents' Supplemental Brief at 3 concedes, "the Bar's decision as to what is or is not chargeable is not infallible." See *Florida Bar Re Schwarz*, 526 So. 2d 56, 57 n.2 (Fla. 1988). Indeed, *Frankel's* rejection of the Bar's claim that lobbying on "children's issues" is chargeable demonstrates the likelihood that in calculating the dues amount the Bar will, out of self-interest or honest error, include as chargeable expenditures which are constitutionally nonchargeable. See Supp. App. 7-8.

*Frankel* does not, however, change the fact that under the Bar's procedure escrow does not occur until after the Bar has had



opportunities to spend dues on nonchargeable activities. Thus, the Bar's scheme still is constitutionally inadequate, because it "merely offers dissenters the possibility of a rebate" and "does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose," *Hudson*, 475 U.S. at 305. See Petitioner's Brief at 21-22; Reply Brief at 5-6, 12-13.

Fourth, even if the Bar now "is prohibited from budgeting for non-chargeable purposes," Respondents' Supp. Brief at 4, this Court's decisions also prohibit it from requiring dissenters to make multiple objections "disput[ing] the Bar's conclusion that a given issue is chargeable," *id.* See Petitioner's Brief at 19-20; Reply Brief at 14-17.

A general objection is not "meaningless" after *Frankel*, as Respondents' Supplemental Brief at 4 erroneously claims. Under *Hudson*, 475 U.S. at 306-07, the Bar must disclose the basis for its conclusion that the amount of dues it sets at the beginning of each fiscal year is entirely chargeable. The member then has only "the burden of raising an objection" to the total. *Id.* at 306 & n.16 (emphasis added). He cannot be required to specify which of the Bar's expenditures he challenges in order to make that objection, even as a matter of pleading in litigation. *Abood*, 431 U.S. at 239 n.39, 241-42. But his general objection serves to initiate arbitration proceedings and trigger escrow of either his full dues or all but the portion that "an independent audit" verifies "that no dissenter could reasonably challenge." *Hudson*, 475 U.S. at 310.

Finally, the Bar's procedure contains a new constitutional defect as a result of *Frankel*. Before *Frankel*, when the Bar formulated its budget and adopted legislative positions, it only determined whether proposed expenditures were within the Bar's authority under state law. See Petition Appendix ("P.A.") 3a n.4, 25a-26a; Respondents' Brief at 6-8. The Board of Governor's response to a member's "objection to a particular position on a legislative issue" was the first time that it considered whether any of its expenditures were constitutionally chargeable or not under the first amendment as applied in *Keller*. See P.A. 6a n.8.

Now, the Bar claims, for the first time in this litigation, that constitutional chargeability will be taken into consideration by the Board of Governors when it sets the dues amount in adopting the budget and, presumably, again when it takes positions on specific legislative issues. See Respondents' Supp. Brief at 3-4. The Board of Governor's response to a member's objection thus is now the first step of the procedure for reviewing the constitutionality of its own determination of the dues amount, delaying impartial arbitration by at least 45 days. P.A. 6a n.8. However, an objector "is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Hudson*, 475 U.S. at 307. That requirement is not satisfied where an objector obtains review in impartial arbitration only after review by an internal body of the organization—in this case, the *same* internal body—which determined the compulsory fee in the first place. *Weaver v. University of Cincinnati*, 138 L.R.R.M. (BNA) 2174, 2180 (6th Cir. Aug. 26, 1991); see *Hudson*, 475 U.S. at 308.

## CONCLUSION

The decision of the Florida Supreme Court in *Frankel* has no significant impact on the questions presented in this case. The Court still should reverse the decision of the court of appeals and grant all relief requested by petitioner.

Respectfully submitted,

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